85-2068

Supreme Court, U.S.
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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

MIKE DRISCOLL
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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QUESTIONS PRESENTED

1. Does a Deputy Constable serving at the pleasure of the Constable have a constitutional right to speak out favoring the assassination of the President of the United States?

2. Does a law enforcement officer have a constitutional right to speak out in favor of violations of the law the officer has undertaken to enforce?

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PARTIES TO THIS PROCEEDING

PLAINTIFF

Ardith S. McPherson
Attorney Annie S. Garcy
Attorney Bruce Griffiths

DEFENDANT

Constable Walter H. Rankin

Harris County Commissioners Court
County Judge Jon Lindsay
County Commissioner El Franco Lee
County Commissioner Jim Fonteno
County Commissioner Bob Eckels
County Commissioner E. A. Lyons, Jr.
County Attorney Mike Driscoll
Assistant County Attorney Billy E. Lee

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES TO THIS PROCEEDING	II
REFERENCE TO THE OPINIONS DELIVERED BELOW	1
STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
CONTENTIONS IN SUPPORT OF THE PETITION	6
PRAYER	8
SIGNATURES	8
CERTIFICATE OF SERVICE	9
APPENDIX	1a

TABLE OF AUTHORITIES

	Page
UNITED STATES CONSTITUTION	
First Amendment	4
Fourteenth Amendment	4
UNITED STATES STATUTES	
28 U.S.C. § 1201(c)	3
28 U.S.C. § 1343(3)	4
28 U.S.C. § 1343(4)	4
28 U.S.C. § 2201	4
28 U.S.C. § 2202	4
42 U.S.C. § 1983	4
42 U.S.C. § 1988	4
TEXAS CONSTITUTION	
Article XVI, § 1	4
TEXAS CIVIL STATUTES	
Article 6879a	3
Article 2372h	4

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REFERENCE TO THE OPINIONS DELIVERED BELOW

On February 14, 1983, the Trial Court had an evidentiary hearing before ruling on Motions for Summary

Judgment presented by both parties. At the conclusion of the hearing the Trial Court ruled that the Constable lawfully terminated his Deputy. On April 15, 1983, the Trial Court filed its written Order and Final Judgment. (App. 1).

The plaintiff appealed to the Court of Appeals. By its opinion released on July 12, 1984, the Court of Appeals vacated the Trial Court's judgment and remanded it for trial. The Court of Appeals gave consideration only to the fact that the Trial Court said it was ruling on Motions for Summary Judgment. The Court of Appeals disregarded the lengthy hearing and finding of just cause for termination. It remanded it for trial on the merits to resolve any genuine issue of material fact and to make determinations as to the credibility of witnesses. (App. 2, and reported 736 F.2d 175).

On remand, the Trial Court conducted a new trial on January 21, 1985. After both parties rested, the Trial Court made into the record statements it considered its findings of fact and conclusions of law. (App. 3). On February 4, 1985, it filed its Final Judgment. (App. 4).

Plaintiff again appealed to the Court of Appeals. In its opinion released on March 19, 1986 (App. 5; 786 F.2d 1233), that Court held that Ms. McPherson's status was as an utterly ministerial clerk, and that the ill-considered statement by her did not make her unfit for her lowly job in the Constable's office. (On its own motion, the Court of Appeals on April 16, 1986, made two typographical corrections in its opinion and added a footnote to its opinion. Both Appendix 5 and the Federal Reporter reflect those changes from the original opinion.)

STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT

(i) The opinion of the Court of Appeals was entered on March 19, 1986.

(ii) No rehearing was requested.

(iii) 28 U.S.C. § 1201(c) authorizes this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 6879a, Vernon's Texas Civil Statutes:

> Section 1. The duly elected Constable in each Justice Precinct may appoint Deputies in accordance with the provisions of Section 2 of this Act, and each and every instance said Deputy Constables shall qualify as required of Deputy Sheriffs.
>
> Section 2. When the Constable in each and every instance named and described in the preceding section of this Act shall desire to make appointment of a Deputy or Deputies, as the case may be, said Constable shall first make written application to the Commissioners' Court of his County showing that it is necessary for such Constable to have the Deputy or Deputies requested in order to properly handle the business of his office originating in the Precinct in which such Constable has been elected, giving the name of each proposed appointee; and if the Commissioners' Court shall find that the Constable is in need of the Deputy or Deputies requested to handle the business originating in his Precinct, then and in that event, and in that event only, the Commissioners' Court shall approve and confirm the appointment of the Deputy or Deputies provided by this Act.

Article 2372h, Vernon's Texas Civil Statutes, is lengthy, but Section 1 thereof can be summarized that a County officer may appoint a Deputy, direct and control the work of the Deputy, and terminate the employment at the pleasure of the officer.

Plaintiff alleged jurisdiction in her petition under the First and Fourteenth Amendments to the Constitution, and under 42 U.S.C. §§ 1983 and 1988, as well as under 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202. The Constable did not challenge any of the jurisdictional allegations in the Trial Court, or in the Court of Appeals, or in this Court.

STATEMENT OF THE CASE

At the request of a friend of hers who was a Deputy Constable, Ardith McPherson made application to Constable Rankin for appointment as a Deputy doing clerical duties. The Constable did appoint her and deputized her as his Deputy on January 12, 1981. His appointment stated that he appointed her having full confidence in her to be his true and lawful deputy, in his name, place and stead to do and perform any and all acts pertaining to the office of Constable. Her contract stated that she understood that her employment could be terminated at will by her employer. She also took and subscribed to the oath of office prescribed by § 1 of Article XVI of the Texas Constitution, that she would to the best of her ability preserve, protect and defend the Constitution and laws of the United States and of this State.

Harris County carries life insurance on all employees, including employees of the Constable. The insurance policy with the insurer does not become effective until

the employee has been in service 90 days. All appointments accordingly are temporary, and do not become vested until the 90 day in-service period is complete and the insurance coverage is accorded to the employee. The appointment of Ms. McPherson was terminated prior to the expiration of the probationary period, by some two weeks.

On March 30, 1981, President Reagan was shot in an attempt to murder him. Radio coverage was full and continuing on followup reports of the extent of the President's injuries and possibility of recovery. In the computer room in the Constable's office where Ms. McPherson worked was a radio, tuned to such a reporting. She was listening to the reporting that President Reagan would recover. She then said to a friend working with her that: "I hope if they go for him again, they get him." Captain LeVrier, a senior Deputy Constable, heard her statement, came up to her and questioned if she really meant that statement. In testimony to the Court, Ms. McPherson says she did not answer, she just smiled at the Captain. The Captain says she told him she did mean the statement. He then reported the conversation to the Chief Deputy Constable, who then told the Constable. The Constable called Ms. McPherson to his office and he asked her if she meant the statement. Testimony in the Court differs: Ms. McPherson saying that she did not mean it, and the Constable saying that she told him she did mean it. He then terminated her as his Deputy. She instituted this suit.

Aside from relief on the office telephone answering, Ms. McPherson fed information from Court process into a new system, a County-wide Justice Information Man-

agement System (JIMS), so that the various Courts, Court Clerks, Constables and Sheriff could call up on their own computers the information she fed into the system. Any official user of such information could track the current status of any process and be aware of exactly where the process was at any time and what, if any, problems were posed for the execution of the process. After the initial input of information by the Deputies in Constable Rankin's office, each agency thereafter handling the process added its input to the computer system, as information to all other agencies using the system.

CONTENTIONS IN SUPPORT OF THE PETITION

Texas law gives the Constable the authority to appoint only Deputies to assist him in the performance of his official duties. Had he not utilized the services of Ms. McPherson to feed information into the computer, HE would have to do such work. Had he not utilized the services of Ms. McPherson to answer his telephones, HE would have to do such work. His duties in a large metropolitan county are so voluminous that he cannot perform them by himself. He is aided by approximately 100 Deputies, all of whom he appointed with full confidence in their ability to do his official duties as he himself would do them. To the public, each of his Deputies is his *alter ego*. The public did not vote for his Deputies, the public voted for Walter Rankin. He is the only one who promised the people to uphold the law as Constable. When he appointed them, the Deputies promised *him* that they also would uphold the law in his place and stead. They swore to the Constitutional oath to protect, preserve and defend the Constitution and laws of the United States and

of this State. Murder and attempted murder are against the laws of the State of Texas and of all the civilized world. Murder and attempted murder of the President of the United States are violations of the laws of the United States. Espousal of such violations of law, a desire to see such violence committed against *anyone,* are contrary to the attributes that are a necessary part and parcel of the public expectation required of an officer of the law. An officer is an enforcing arm of the law. As its servant, the public has accorded to the officer a right to enforce the public's compliance with the laws of the land. The Court of Appeals deemed insignificant the amount of authority the Constable had invested in the duties assigned to Ms. McPherson. It is true that the Deputy had not served out her period of probation, and that she was not qualified by education and training to carry a weapon and act as a law enforcement officer under the professional standards established by the State of Texas, but she still was a *Deputy* of the Constable, doing his duties that had been assigned to her so that the Constable's personal time could be better utilized in the performance of other duties requiring the exercise of *his* professional training and standards as a law enforcement officer.

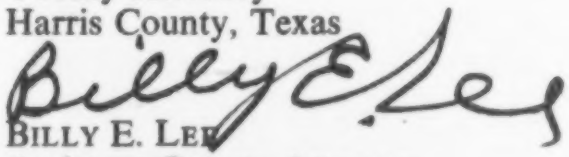
The Court of Appeals deemed her expression, wishing the President killed, as not disturbing the efficiency and morale of the office. Isolated by time and distance from the occurrence, the Court assumed incorrectly. The statement was uttered in a law enforcement office, by a Deputy supposed to be working at her assigned duties, and in the presence of other Deputies. Her statement was immediately challenged by a supervisor, Captain LeVrier, and, after that confrontation it was reported through channels to the Constable. The efficiency and morale of

the office WAS threatened. Professional law enforcement officers did consider such words in the context of being not only desirous of violations of elementary law but also an unprofessional expression in a law enforcement office, inconsistent with the oath taken by the speaker to protect, preserve and defend the laws.

WHEREFORE, petitioners pray the Court to grant this writ of certiorari to the Court of Appeals for the Fifth Circuit, that it reverse the judgment of that Court, and that it affirm the judgment of the Trial Court.

Respectfully submitted,

MIKE DRISCOLL
County Attorney
Harris County, Texas



BILLY E. LEE
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that on this 16 day of June, 1986, true copies of this Petition for Writ of Certiorari were placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent:

Ms. Annie S. Garcy
5959 West Loop South, Suite 303
Bellaire, TX 77401

Mr. Bruce V. Griffiths
1236 West Gray
Houston, TX 77019

Billy E. Lee

BILLY E. LEE
Assistant County Attorney

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On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

APPENDIX

1. District Court Order and Final Judgment dated April 15, 1983.
2. Court of Appeals opinion of July 12, 1984 (736 F.2d 175).
3. Partial Transcript of Proceedings, January 21, 1985, Remarks of the Trial Judge (pp. 178-184).
4. District Court Final Judgment dated February 4, 1985.
5. Court of Appeals opinion of March 19, 1986, as corrected April 16, 1986 (786 F.2d 1233).

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

FINAL JUDGMENT

Based upon the findings of fact and conclusions of law entered this date, and pursuant to Fed. R. Civ. P. 58, judgment is hereby entered for Defendant. Plaintiff's claims for relief are in all ways denied.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

ORDER

This is a suit alleging wrongful termination of employment in violation of Plaintiff's First Amendment rights of free speech. It is agreed that but for Plaintiff's statement on March 30, 1981, Plaintiff would not have been discharged on that date. There being no jury question to be decided, a hearing was held on February 14, 1983, to determine whether Plaintiff's speech was protected. Based upon the pleadings and evidence, the Court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Ardith McPherson is an adult citizen of the United States of America, and is a resident of Harris County, Texas.

2. Defendant Walter Rankin is the elected Harris County Constable for Precinct One (1). He is sued

both individually and in his official capacity as Constable. Defendant Harris County is a political subdivision of the State of Texas.

3. Defendant Walter Rankin, as elected Constable of Harris County, Texas, is authorized to hire employees subject to approval by said County, through its Commissioners' Court. Tex. Rev. Civ. Stat. Ann. art. 6879a § 2 (Vernon 1960).

4. Defendants at all times mentioned herein acted under color of state law.

5. Plaintiff Ardith McPherson was hired by Defendants on January 14, 1981, as a Deputy Constable of Harris County, Texas.

6. As a Harris County Deputy Constable, Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct.

7. Defendant Walter Rankin employed Plaintiff for a ninety-day probationary period. At the time Plaintiff was terminated, she had two weeks of her probationary period remaining.

8. Plaintiff's application for employment, County Auditor's Form 3405, dated January 12, 1981, read, in part:

> I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime.

I certify that the statistical and personal data shown above are correct.

January 12, 1981. (signed) Ardith S. McPherson

9. The Deputation portion of Form 3405, signed by Constable Rankin the same date read:

> I, Walter H. Rankin, Constable, Precinct #1, of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners' Court.
>
> Witness my hand at Houston, Texas, this January 12, 1981.
>
> (signed) Walter H. Rankin
> Constable, Precinct #1

10. Plaintiff's notarized oath of office, also on Form 3405 read:

> I, Ardith S. McPherson, do solemnly swear (or affirm), that I will faithfully execute the duties of Clerk of Harris County, Texas, and will to the best of my abilities preserve, protect and defend the Constitution and laws of the United States and of this State; and I, furthermore solemnly swear (or

affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the appointment to the above named position. So help me God.

Subscribed and sworn to before me at Houston, Texas, this January 12, 1981.

(signed) Ardith S. McPherson

11. Pursuant to Texas law, all employees of the Constable's office, regardless of job function, are deputy constables and must give the prescribed oath of office. See Vernon's Rev. Civ. Stat. Ann. art. 6879a and 6879b.

12. On March 30, 1981, during the lunch hour, Plaintiff and some other employees heard on an office radio, an announcement of the assassination attempt on President Reagan. Plaintiff concluded a discussion with a coworker about that event and about Reagan administration economic policies with the statement, "I hope if they go for him (President Reagan) again, they get him."

13. The statement was overheard by Captain Levrier, a Deputy Constable, who reported the incident to Constable Rankin. When summoned to Constable Rankin's office, and in the presence of the Constable, Captain Levrier, and Captain Abercia, Plaintiff confirmed that she made the statement in issue.

14. Plaintiff testified that she told Constable Rankin, "Yes, but I didn't mean anything by it." Plaintiff claims her statement did not signify an actual intent on her part to harm or to participate in harming the President.

15. Constable Rankin, Captain Levrier, and Captain Abercia each testified that Plaintiff repeated the statement in the Constable's office. The Constable testified that when he asked her whether she meant it, Plaintiff replied, "I sure do."

16. Constable Rankin instructed his secretary to take Plaintiff off the payroll immediately.

17. When Plaintiff returned the next day seeking an interview with the Constable, he refused to see her.

18. Constable Rankin testified that he lost all confidence in the Plaintiff's ability to be a Deputy Constable and as an employee of a law enforcement agency when she repeated (or acknowledged) her statement. He informed her there was no place for her in that office. He considers it a violation of one's sworn duty to uphold the U. S. Constitution and the laws of the State of Texas to espouse the assassination of any president, judge, or other public official. In his judgment, people would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed if he retained an employee who endorsed such actions.

19. The Court finds that, regardless of the seriousness of Plaintiff's intent, the fact that she did make such a statement while on the job indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee. The Constable sincerely and earnestly believes that an individual possessing an attitude such as Plaintiff's is not a suitable employee of a law enforcement agency.

Conclusions of Law

1. This Court has jurisdiction of this case alleging a violation of Constitutional rights under color of state law pursuant to 28 U.S.C. § 1331.

2. A probationary employee such as Plaintiff McPherson may be fired for any reason, or even for no reason—but not for the exercise of her constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972); *Van Ooteghem v. Gray,* 628 F.2d 488, 490 (5th Cir. 1980), on rehearing *en banc,* 654 F.2d 304 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982); *Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1077 (5th Cir. 1976).

3. A public employee's private speech, as well as her public statements, may be protected. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

4. While public employment which may be denied altogether may not be subjected to unreasonable conditions, it is clearly established that the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

5. An agency may regulate speech only as far as necessary to accomplish a legitimate government interest: to promote efficiency; to foster loyalty and obedience to superiors; to maintain morale; to instill public confidence in the law enforcement institution. *Gasparinetti v. Kerr,* 568 F.2d 311, 315-16 (3d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978). Also see, *Kannisto v. City and County*

of San Francisco, 541 F.2d 841 (9th Cir. 1976); *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970).

6. In certain instances a public employee may be discharged on the basis of speech without offending the First Amendment. *Arnett v. Kennedy,* 416 U.S. 134, 160 (1974).

7. In determining the free speech rights of a public employee, the Court must engage in a three-step analysis:

(a) Is the communication protected;

(b) If so, did it play a substantial part in the decision to fire the plaintiff;

(c) If so, would the employer have fired the employee even if the protected communication had not occurred. *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981), citing *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977) and *Pickering, supra; Van Ooteghem, supra* at 491.

8. In the case *sub judice,* the second and third prongs of the test are admitted by Defendant; only step one is in issue.

9. Whether the communication is protected is a question of law to be determined by the Court. *Van Ooteghem, supra,* at 492.

10. To determine whether the communication of a public employee was protected, the Court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* at 568.

11. Plaintiff has the burden of establishing that her speech was protected. *Mt. Healthy v. Doyle, supra.*

12. In balancing these interests, the Court may consider such factors as the need for maintaining discipline by immediate supervisors, the need for harmony among co-workers, the necessity for personal loyalty and confidence between the employer and employee, the disruption to the workplace caused by the speech, and the public's need or right to comments and information from public employees on matters of general concern. See *Pickering, supra,* at 570; *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir. 1981), *cert. denied* 102 S. Ct. 1969 (1982); *Van Ooteghem,* 628 F.2d at 492; *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980).

13. In striking the *Pickering* balance regarding private expression, a Court should consider the content and manner, the time and place of the speech. *Givhan, supra,* at 415, n.4.

14. In the case at bar, Plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, Plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the Plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

15. The Court concludes that the application of the *Pickering* balancing test shows Plaintiff's speech to be clearly unprotected.

16. Additionally, an employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. *Weisbrod v. Donigan,* 651 F.2d 334, 336 (5th Cir. 1981), *rehearing en banc denied,* 659 F.2d 1079; *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert. denied,* 439 U.S. 877 (1978); *Megill v. Board of Regents of the State of Florida,* 541 F.2d 1073 (5th Cir. 1976). Also see *Phillips v. Adult Prob. Dept., City & Cty. of San Francisco,* 491 F.2d 951 (9th Cir. 1974).

17. The Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement. See *Megill, supra* at 1085.

18. It was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as Plaintiff's, at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions.

19. Plaintiff McPherson's First Amendment rights were not violated by her discharge.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX 2

Ardith McPHERSON,
Plaintiff-Appellant,

v.

Walter RANKIN, Individually and In His Official Capacity As Constable, Precinct One of Harris County, TX and Harris County Texas,
Defendants-Appellees.

NO. 83-2399.

United States Court of Appeals,
Fifth Circuit.

July 12, 1984.

Former deputy constable brought suit against constable and county, alleging she was denied her rights secured by First and Fourteenth Amendments when she was fired by constable for a political remark she made to a co-worker during a private conversation. The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of constable and county, and former deputy constable appealed. The Court of Appeals, Tate, Circuit Judge, held that substantial issues of material fact existed as to "context" in which statement was made, including whether deputy constable admitted to constable that she seriously meant what she said regarding attempted assassination of President and was not speaking in political hyperbole, precluding summary judgment.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before TATE, JOLLY, and DAVIS, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Ardith McPherson, a non-tenured deputy constable[1] formerly employed by the defendant Constable of Harris County, Texas, appeals from the grant of summary judgment against her in her 42 U.S.C. § 1983 suit against Constable Walter Rankin and Harris County, Texas. The plaintiff McPherson alleges that she was denied her rights secured by the First and Fourteenth Amendments when she was fired by the Constable for a political remark made to a coworker during a private conversation. Finding that the existence of substantial issues of material fact made summary judgment inappropriate, we vacate the judgment in favor of the defendant Walter Rankin, and remand for a full trial on the merits.

On March 30, 1981, during lunch hour, McPherson and a coworker, after hearing of an assassination attempt on President Reagan, engaged in a brief, private conversation about their opposition to the President's policies on welfare and unemployment. The plaintiff concluded the discussion with the statement: "I hope if they go for him [President Reagan] again, they get him."[2]

---

1. McPherson was employed as a deputy clerk whose primary responsibility was to enter civil papers into a computer. Her duties were limited to clerical jobs. She did not wear a uniform nor was she authorized to carry a weapon or make arrests. She had no contact with the public other than occasionally answering the office telephone.

McPherson was hired for a ninety-day probationary period. At the time she was fired, two weeks of her probationary period remained.

2. The district court's version differs slightly from McPherson's accounting of what exactly was said. McPherson testified at the summary judgment hearing that she said, "[I]f they go for him again, I hope they get him."

A deputy constable overheard this statement and reported it to Constable Rankin who summoned McPherson to his office. McPherson admitted to the Constable that she made the statement. A genuine dispute exists in the factual showing, however, over whether she also admitted that she actually intended the remark as seriously made.[3] Constable Rankin then summarily fired the plaintiff.[4]

McPherson then in June 1981 sued Constable Walter Rankin and Harris County, alleging a violation of her constitutional rights under color of state law. 42 U.S.C. § 1983. Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, McPherson filed a motion for summary judgment. The defendant Constable Rankin responded and requested a dismissal, claiming that McPherson failed to state a cause of action upon which the court could grant relief. The district court considered the parties' opposing motions as cross-motions for summary judgment, and it ordered an evidentiary hearing, which was held on February 14, 1983, to determine whether the plaintiff's speech was protected under applicable First Amendment principles. Following the hearing, the district court granted summary judgment in favor of the defendant Walter Rankin; McPherson appeals.

[1] In reviewing a district court's grant of summary judgment, we are required to consider the evidence pre-

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3. Of the four persons present in Constable Rankin's office—Constable Rankin, Chief Deputy Abercia, Captain LeVrier, and Ardith McPherson—Rankin and LeVrier claim McPherson said she meant the remark, while Abercia did not recall whether Constable Rankin asked the plaintiff whether she meant what she said. McPherson argues that she pointedly told the Constable, "I didn't mean anything by it."

4. McPherson testified that she returned the following day to try to explain what she meant to the Constable, but was denied an interview.

sented in the light most favorable to the party opposing the motion. *Simon v. United States,* 711 F.2d 740, 743 (5th Cir. 1983). Hence, the factual recitals in the opponent's affidavit as well as hearing testimony of McPherson and her witnesses must be regarded as true for the purposes of this appeal.

[2, 3] If there is a genuine issue of material fact which would cause a dispute to reasonably be resolved in favor of the party resisting the summary judgment, the summary judgment cannot stand. *National Hygienics, Inc. v. Southern Farm Bureau Life Insurance Company,* 707 F.2d 183, 186 (5th Cir. 1983). That the movant appears to the court more likely than not to prevail at trial is no reason to grant summary judgment; it is not the province of the trial court on motion for summary judgment to weigh evidence, assess its probative value or decide factual issues. *Byrd v. Roadway Express, Inc.,* 687 F.2d 85, 87 (5th Cir. 1982). The standard is simply that the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[4] Prior to its ruling granting summary judgment in favor of the defendants, the trial court ordered a hearing so that it could "hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in plaintiff's position affects the ability of the constable's office to perform its services efficiently." In determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations including the "manner, time, and place in which it is de-

livered," and the intention of the speaker. *Bickel v. Burkhart,* 632 F.2d 1251, 1256-57 (5th Cir. 1980).

In this instance, the statement was made by McPherson during the lunch hour in a conversation between McPherson and her boyfriend, a coworker. The conversation took place in a non-public computer room of the constable's workforce; only two other regular coworkers in the room were present at that time, and one of them that testified stated that she did not overhear the conversation when it took place. However, the conversation chanced to be overheard by a deputy constable, who had entered the computer room to pick up papers to take to other precincts. He immediately reported the conversation to the Constable Rankin, the defendant, precipitating the events and McPherson's discharge at issue.

At the evidentiary hearing, Ardith McPherson testified that her statement—"if they go for him again, I hope they get him"—was intended only as a verbal expression of her anger with the Reagan administration's social and economic policies. The plaintiff maintained that "it is just like if I ask my sister to pick me up somewhere and she's late and I say, 'Where is she.' and I said 'Wait till she get[s] here, I'm going to kill her.' That don't mean I'm going to kill her with a gun or knife or weapon. It is an expression of conversation." Hence, the essence of McPherson's contention is that her statement was merely a form of political hyperbole and was not intended to advocate harm to the President.

McPherson also testified that when confronted by Constable Rankin, she assured him that she "didn't mean anything by it," but was not allowed to further explain her comment to him. Constable Rankin testified that

when he asked Ms. McPherson whether she meant what she said, her reply was "I sure do."

[5] The issue of McPherson's intent[5] is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its "content, form, and context". *See Connick v. Myers*, ___U.S. ___, ___, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), cited with approval in *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009, 1013, (5th Cir. 1984) (factors include employee's motives in voicing the expressions at issue and their context).

[6] Thus, in a § 1983 suit brought by a public employee against his public employer, the "manner, time,

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5. With regard to peripheral issues: In its order of January 10, 1983, the district court stated that it was "convinced that plaintiff's comment in no way constituted a violation of either 18 U.S.C. § 2385 or 18 U.S.C. § 871(a)." Secion 2385 provides for federal conviction for one who intentionally advocates the overthrow of the government. To violate section 871(a), one must "intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would foresee that the statement would be interpreted by persons hearing . . . it as a serious expression of intention to inflict bodily harm upon or take the life of the President." *United States v. Rogers*, 488 F.2d 512, 514 n. 3 (5th Cir. 1974), *rev'd on other grounds*, 422 U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1, *on remand* 519 F.2d 1084 (5th Cir. 1975).

It is not necessary to prove an intention to carry out the threat under section 871(a), *id.*, 488 F.2d at 514, but is necessary to prove a "true threat." In *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L.Ed.2d 664 (1969), the Supreme Court found that the defendant's statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a true threat, but a form of political hyperbole. Watts' "only offense . . . was 'a kind of very crude offensive method of stating a political opposition to the President.'" *Id.* at 708, 83 S. Ct. at 1402.

McPherson's intent is, however, significant in the present *civil* case, as a relevant factor in the overall context of the statement.

and place" of a statement, and the "context" in which it is made, as revealed by the whole record, is relevant to the determination of whether the statement is protected under the First Amendment. *Id.* ____ U.S. at ____, 103 S. Ct. at 1693.

The context of the speech is especially material when private expression is involved. In *Bickel v. Burkhart,* 632 F.2d 1251, 1257 (5th Cir. 1980), this court noted that when a public employee expresses himself publicly, the primary focus is on the content of his speech; however, where private expression is involved, the balancing test encompasses the manner, time and place in which it is delivered as well as the context in which the statement is made. *See Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n. 4, 99 S. Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979).

The court's task is to fully consider each of these factors in applying the *Pickering (infra)* balancing test, which compels us "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Based upon the testimony evinced at this hearing, the court issued an order on April 15, 1983, in which it concluded:

> The plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined

> her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

Offering no further reasons for its determinations,[6] the court concluded that McPherson's speech was unprotected under the *Pickering* balancing test.

[7] As to the intent or motivation of the plaintiff, the trial court merely noted the discrepancy in the testimony regarding McPherson's intention in making the statement. The district court was, of course, unable to make a finding on this issue because of conflicts in the testimony on this material issue. Indeed, it is not the district court's function on a motion for summary judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead the court must consider the facts presented and resolve all doubts in the light most favorable to the non-moving party. *See Williams v. Shell Oil Company,* 677 F.2d 506, 509 (5th Cir.), *cert. denied,* 459 U.S. 1087, 103 S. Ct. 570, 74 L.Ed.2d 933 (1982).

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6. The court ostensibly engaged in an three-step analysis derived from *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 286, 97 S. Ct. 568, 575, 50 L.Ed.2d 471 (1977):
   1. Is the communication protected?
   2. If so, did it play a substantial part in the decision to fire the plaintiff?
   3. If so, would the employer have fired the employee even if the protected communication had not occurred?

[8, 9] On a motion for summary judgment, the moving party must demonstrate that the facts underlying all relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment should be denied. Fed. R. Civ. P. 56(c). As noted above, we perceive that substantial issues of material fact existed as to the "context" in which the statement was made,[7] including whether McPherson admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole.[8]

The issues presented in this case would more properly be resolved after a trial on the merits because we find the existence of substantial issues of material fact. We, therefore, VACATE the district court's summary judgment and REMAND for a full trial on the merits.

VACATED AND REMANDED.

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7. The court further held that McPherson's discharge was justified because her "speech-related conduct . . . evidenced character traits undesirable in an employee." If the plaintiffs speech was unprotected, then, under the terms of her contract as a non-tenured employee, she was terminable at will without notice by her employer. The justification for the discharge thus enunicated is necessary only if she was discharged for the exercise of protected speech.

Should, on remand after a full factual hearing, the district court determine that the plaintiff's speech was indeed protected, the court will then have to apply the remaining factors of the test expressed in *Mt. Healthy*, *see* note 8, *supra*. For instance, when an employee is fired, not for the content of what he has said, but for undesirable character traits evidenced by the speech, he may have no claim to First Amendment protection from the discharge. *See Garza v. Rodriguez*, 559 F.2d 259, 260 (5th Cir. 1977), *cert. denied*, 439 U.S. 877, 99 S. Ct. 215, 58 L.Ed.2d 191 (1978) (drunken, belligerent behavior accompanied by abusively foul language); *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1085 (5th Cir. 1976) (false and misleading public statements, profanity, disruption of public meetings).

8. Relevant to McPherson's due process claim implicated by her complaint, is the Constable's refusal, both on the day of the incident and the following day, to allow McPherson to explain herself.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

v.

WALTER RANKIN, Individually And In His Official Capacity As Constable, Precinct One (1), Of Harris County, Texas; And Harris County, Texas,
Defendants.

Houston, Texas

January 21, 1985

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

Appearances:

For the Plaintiff:

Ms. Annie S. Garcy
Mr. Bruce Griffiths

For the Defendants:

Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:

June Simon

* * *

Have someone who is not marching in step to our drummer, here in our midst as one of us. If we were talking about the Dolphins and the 49'ers, this would be just like a guard on the Dolphins coming back to the huddle there and telling the quarterback, Marino, that I hope that linebacker for the 49'ers smears you on the next play.

This is inconsistent with our team pattern here, and it is not a variation that we can live with, and it is not a variation that the Constitution expects a law enforcement officer to live with. Thank you.

The Court: All right.

Last word, Mr. Griffiths.

Mr. Griffiths: Very briefly, Your Honor. If this case hinges on Ardith McPherson being a law enforcement officer, I would suggest to the Court that the evidence was essentially uncontroverted that she was not such an officer. She was not trained, she was not commissioned, she was not authorized under the laws of the State of Texas to perform any service as a law enforcement officer. She was paid minimum wage to type documents—data off civil papers into the computer. That is her job. That is the undisputed evidence, that that was her job. And if she—if this argument—which apparently does rest on her being a law enforcement officer—then it must fail.

The Court: This is not any easier the second time around than it was the first. I have the greatest respect for the Plaintiff's position on free speech. I have an equal respect for the responsibility of a constable to maintain a proper office environment. I suppose while

listening to the testimony this second time and re-reading the Fifth Circuit's opinion and re-reading *Connick v. Myers,* I think I understand what the courts are trying to tell us.

There is no question but that Constable Rankin, in his decision, was bound by the First Amendment, through Section 1983. There is no question that Ms. McPherson was a probationary public employee; no question but that she was discharged. I really don't believe there is any question about what she said. In the context of the President's near assassination, she said words to the effect, "if they go for him again, I hope they get him."

The real dispute in the testimony was whether she affirmed those words to the captain who first approached her at her terminal, and once again to Constable Rankin. I believe that by words or deeds, she conceded having said those words to them, and made no attempt to retract them.

But I'm not sure that the real question in this case is what she meant. I think the language we are taking is from the case of *Bickel v. Burkhart,* and that is the language that is important in determining whether private speech by a public employee is entitled to First Amendment protection. To consider the context in which it is made, relevant considerations, including the manner, time and place, and of course later on, the Fifth Circuit says intent relates to context, so I guess the ideas of intent, manner, time and place all tie in to a definition of this equally ambiguous term, context.

The remarks that Ms. McPherson made were made to another employee, Mr. Jackson, in the hearing of a superior officer. I suppose that by the definitions I have

seen, that is certainly private speech. I suppose that is what the Supreme Court and the Fifth Circuit means by private speech, as opposed to going to the public with these things. I'm not sure what the questionnaire in *Myers* was. I guess it was private speech, as well. The questionnaire was rather broadly distributed, but it did concern only internal office matters.

Now, let's put what Ms. McPherson said, in context, as the cases tell us to do. The statement was made so that it sounded like a comment to a radio news report on the attempted assassination of the President. I had the erroneous impression at the original hearing, and carried it to the Fifth Circuit, that this was during her lunch hour, and it apparently was not. It was during the lunch hour, but she was actually on duty, as she just testified a few minutes ago. It was made in the office of the Constable, while she was on duty.

What is the intention of the speaker. I hope that the plaintiff is not suggesting that the intention of one race must be decided by different standards than the intention of another race. That, I find a very disturbing and disquieting theory. If we are to carry Dr. Kochman's philosophy into the law, then the constable ought to treat people differently because of their race, and that is clearly against the law.

I think that the constable was entitled to listen to the words that were said by Ms. McPherson, when she repeated them to him, were confirmed that she had said them to him, and judge those words by their ordinary English context. The constable never accused Ms. McPherson of threatening to go shoot the President again, as Mr. Hinckley had just done. Although he did report

this episode to the Secret Service, he did not fear her because she threatened to do harm to the President.

Then I suppose we get down to the serious question, what did she "mean." I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

It's not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to approve even more to the second attempt at assassination.

I believe Constable Rankin is very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be. He does do a great deal of work with the public. If the people he hires mistreat the public, disappoint the public, insult the public, Constable Rankin is not going to get re-elected, and he is not going to be following his sworn oath.

Certainly he had some concern about the security questions that Ms. McPherson would have access to; delicate information about the whereabouts of the President. I think that is far less significant in his motivation than the question of the statement by Ms. McPherson, indicating to him she was the kind of person who would be a bad employee, would be a negative influence in the office.

I think what we have at this point is the *Pickering v. Board of Education* balance test. Who has more right? Ms. McPherson, to say, if they go for him again, I hope they get him, or Constable Rankin's right to promote the efficiency of the public service, through his employees.

In looking at the balancing test, I have got to go with Constable Rankin, as I did on the initial hearing. I think applying the *Mt. Healthy City School District Board of Education v. Doyle* test, number one, is the communication protected, no, I do not believe it is. I do not believe that that is protected speech. But applying the second part of the test, it certainly was a substantial part in the decision to fire her, and I doubt that he would have fired her had she not made that comment. I know I'm not required to reach the second two points, having found against the plaintiff on the first.

In the context of those remarks, I do not believe that they were protected speech, and I believe that forecloses her under *Mt. Healthy* and *Garza v. Rodriguez*. All of these cases, of course, are cited by the Fifth Circuit.

I would have to do what I did before, after hearing the evidence before, and that is hold for the defendant.

Anything further, Counsel?

Mr. Lee: Nothing further.

Mr. Griffiths: Nothing Further.

Mr. Lee: Thank you, Your Honor.

The Court: Thank you very much for presenting this matter in a straighforward and efficient manner.

Mr. Griffiths: Your Honor, is the court—is that opinion from the bench the court's opinion?

The Court: Those will be my Findings of Fact and Conclusions of Law.

Mr. Griffiths: Thank you, Your Honor.

(Proceedings concluded)

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed February 4, 1985)

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and based on the findings of fact and conclusions of law entered on the record in this cause, judgment is hereby entered for Defendants. Plaintiff's claims for relief are in all ways denied. Each party in this action shall bear its own costs.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 4th day of February, 1985.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2129

OPINION

ARDITH McPHERSON,
Plaintiff-Appellant,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One of Harris County, Texas, and HARRIS COUNTY, TEXAS.
Defendants-Appellees.

(Filed March 19, 1986)

Before: Jerre S. Williams, Patrick E. Higginbotham, and W. Eugene Davis, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham

Appeal from the United States District Court
for the Southern District of Texas

Norman W. Black, District Judge, Presiding

SUMMARY

Civil Service/Constitutional Law

Appeal from district court decision upholding the dismissal of a public employee after finding that a remark she had made was not protected speech. Reversed and remanded.

Ardith McPherson was a clerical worker in a Houston, Texas constable's office. After hearing a radio report of the attempted assassination of President Reagan on March 30, 1981, McPherson said to a co-worker: "[I]f they go for him again, I hope they get him." The statement was made to the co-worker at the end of a discussion about the President's policies. A deputy constable overheard the statement and reported it to Constable Rankin, who immediately questioned McPherson about it. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her. McPherson filed suit against both Rankin and the county. The district court held that the remark was more than mere political hyperbole, that it was not protected speech, and that Rankin could fire her for it. On appeal, McPherson argues that the district court erred in not recognizing the political nature of her speech and in concluding that it was not within the protective ambit of the first amendment.

[1] Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression. If it is established that the speech in question is addressed to "matters of public concern," the first amendment interest in protecting the employee's freedom of speech must be balanced against the government's interest in maintaining discipline and efficiency in the workplace. [2] The record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. Although she has denied that this was her view and she is supported by the only person who heard the remark in context, her statement to Rankin that she "meant" what she said pro-

vides the requisite support for the district court's "factual" finding. [3] Regardless of her intent, however, her comment clearly addressed a matter of public concern, be it a hyperbolic expression of unhappiness with the President's policies or an actual wish for his assassination. Therefore, the value of protecting her right to express her opinion, however loathcome, must be weighed against competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

[4] Here, the government's interest does not outweigh the first amendment interest in protecting McPherson's speech. Her comment was made to a co-worker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office. [5] Although a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency, [6] because of the utterly ministerial nature of her duties, McPherson's potential for undermining the office's mission was trivial. She was one of a dozen clerk-typists, she was not a law enforcement officer, her job did not bring her into contact with the public, and she had no access to sensitive or important files. Under these distinct circumstances, McPherson could not be constitutionally fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On March 30, 1981, President Reagan was shot. After hearing a radio report of the attempted assassination, Ardith McPherson, a clerical worker in a Houston, Texas constable's office, said to a co-worker: "[I]f they go for him again, I hope they get him." A deputy constable overheard the statement and reported it to Constable Rankin, who immediately summoned McPherson to his office to question her about the remark. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her.

McPherson sued Rankin and Harris County under 42 U.S.C. § 1983. After the district court granted defendants' motion for summary judgment, a panel of this court remanded for a trial on the merits. Noting McPherson's contention that "her statement was merely a form of political hyperbole and was not intended to advocate harm to the President," *McPherson v. Rankin*, 736 F.2d 175, 178 (5th Cir. 1984), the panel observed that "[t]he issue of McPherson's intent is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its 'content, form, and context.'" *id.* at 178-79 (citation and footnote omitted).

After the ordered trial, the district judge ruled from the bench, explaining:

> I'm not sure that the real question in this case is what she meant. . . . I suppose . . . that [this] is certainly private speech . . . I don't believe she

> meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

The court also found that Rankin had a need for employees who will not "mistreat the public, disappoint the public, [or] insult the public," and concluded by purporting to balance McPherson's speech-related interests against the interests of the constable's office in law enforcement. In holding that McPherson's remark was not protected speech, the court seems to have concluded both that McPherson actually hoped that the President would be killed and that Rankin could fire her for that view. In Constable Rankin's colorful words, he ought not be required to employ a person who "rides with the cops and cheers for the robbers."

II

McPherson argues that the district court erred as a matter of law in not recognizing the political character of her speech and in concluding that it was not within the protective ambit of the first amendment. She also urges that the interests of her employer do not outweigh her rights of free speech. Defendants reply that McPherson espoused "a violation of the criminal law of murder . . . completely inconsistent with the oath to uphold the laws to which both the Constable and the Deputy have been sworn [and that it] is not only the

right of the Constable but also his duty to terminate a Deputy's appointment when that Deputy apparently desires to see the criminal laws violated."

III

-1-

Hornbook law informs us that the first amendment, as applied to the states, *Wallace v. Jaffree,* 105 S. Ct. 2479, 2486 (1985), protects a very wide range of speech from suppression by the government. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969). Although not all spoken words are covered by the first amendment, *Konigsberg v. State Bar,* 366 U.S. 36, 49 n.10 (1961), constitutional protection extends to expression concerned with private matters, *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), as well as to speech that takes place in private. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 415-16 (1979). A state would therefore face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot.

[1] The government has not sought to prosecute McPherson as a criminal, but to terminate her from a public job, which presents a very different set of legal questions. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick v. Myers,* 103 S. Ct. 1684 (1983). Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression: "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the

reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick,* 103 S. Ct. at 1690 (citations omitted). This rule is based on "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 1688 (footnote omitted). If it is established that the speech in question is addressed to "matters of public concern," we are required to balance the first amendment interest in protecting the employee's freedom of expression against the government's interest in maintaining discipline and efficiency in the workplace. *Id.* at 1686. In striking this balance, we must give *"full* consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 1692 (emphasis added), and we must *not* demand that the government employer "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *id.* (footnote omitted).

With these well-worn principles in mind, we must first decide whether McPherson was fired for her expressed views on a matter of public concern. She has maintained throughout this litigation that her statement was meant as a criticism of the President's social and economic policies, and no one has contended that she could constitutionally be fired merely for criticizing those policies. A difficulty arises, however, because she chose such a repulsive, nigh obscene, manner of making her criticism. Had she been fired solely for the disgusting manner of her expression, the first amendment would arguably pose no barrier to Constable Rankin's employment decision. We doubt that public employees could wrap the protective mantle of the first amendment around a string

of gutter words simply by appending a remark to the effect that those words describe some public figure or policy.

However, McPherson was undoubtedly fired because of the *content* of her speech. The district court judge found that McPherson's comment was "something more" than political hyperbole and he was apparently persuaded that she was fired because she honestly hoped that any future assassination attempt would be successful. Whatever her subjective intent, that is what she said and it is quite plausible that Rankin was telling the truth when he said that that is why he fired her.[1] Because the life and death of the President are obviously matters of public concern, we are therefore required to engage in *Pickering/Connick* balancing and to decide whether society's interest in protecting McPherson's freedom of speech is outweighed by the constable's interest in having employees who do not favor political assassination.

-2-

Constable Rankin is elected to a four-year term on a partisan ballot from Precinct One in Harris County, Texas. This precinct, with approximately three hundred fifty thousand residents, encompasses downtown Houston and a portion of its suburbs. It is wholly within the police jurisdiction exercised by the City of Houston and nearby suburban municipalities. The constable's office, which had eighty-odd employees in 1981, has no direct law enforcement role, and none of its deputies are "on

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1. Were there a substantial contention that McPherson was actually terminated for expressing disapproval of the President's policies, we would be faced immediately with the standard-of-review problems discussed *infra* Section III.3.

the street." Its primary mission is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars. Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts. Though Rankin hinted that his office might somehow participate in providing security during presidential visits to Houston, he never explained how this might be, and the district judge did not regard it as a serious suggestion.

All employees in the office are officially referred to as "deputy constables," but only those who are commissioned peace officers may carry firearms, serve process, or execute warrants. To become a commissioned peace officer, one must undergo a background check, a psychological exam, and over 300 hours of training. McPherson, who received only two days of computer instruction when hired, was not a commissioned peace officer. She played an entirely clerical role within the office: seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT.

McPherson testified without contradiction that her statement about the attempted assassination was made at the end of a discussion about the President's policies with a co-worker, Lawrence Jackson, whose duties were identical to hers. At trial, Jackson corroborated McPherson's testimony and explained that he understood her remark as merely "a response and an expression." He was not cross-examined. McPherson testified that Constable Ran-

kin did not allow her to explain the context of the overheard remark; Jackson, the witness to its context, was not consulted. Indeed, Rankin does not deny that the remark was part of a discussion between two employees about their opinions of the President's policies; he testified that because McPherson conceded that she "meant" the remark, he felt no duty to inquire further.

-3-

For the purpose of applying the *Pickering/Connick* balancing test, we accept the district court's conclusion that McPherson actually hoped that the President would be assassinated. The precise fit of the clearly erroneous standard of review and our duty to make "an independent constitutional judgment on the facts of the case," *Connick,* 103 S. Ct. at 1692 n. 10 (quoting *Jacobellis v. Ohio,* 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)), is not altogether clear. We are enjoined to "determine the meaning and application of those words of [the Constitution] which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect." *Pennekamp v. Florida,* 328 U.S. 331, 335 (1946) (footnote omitted). The task of simultaneously applying both independent and deferential standards of review is of course more difficult at their juncture than at their distant edges. *See generally, Bose Corp. v. Consumers Union of United States, Inc.,* 104 S. Ct. 1949 (1984). For example, when what was said and its context are undisputed, the con-

stitutional "status" of the speech is to be independently examined by an appellate court. When what was said, but not its context, is disputed, the choice belongs to the trier of fact; on appeal, the determination of what was said is subject to review by the clearly erroneous standard, and the constitutional "status" of the statement is given independent review. Yet, when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain: factual conclusions about the speaker's intent, audience effect, and other elements of context are not so easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns."

[2] With this caution in mind, we find that the record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. It is true that she has at every stage of this litigation denied that this was her view or the purpose of her statement, and she is supported by the only person who heard the remark in context. McPherson's subjective intent, however, was an historical fact, and her statement to Rankin that she "meant" what she said provides the requisite support for the district court's "factual" finding, which may have been based in part on the demeanor of the witnesses. The question is close, resting ultimately on an inference drawn from the inevitably ambiguous response to the question, "Did you mean it?" That inference is a slender but adequate reed: we are not left with the firm belief that a mistake was made in this finding of fact by the district court.

[3] Regardless of her intent, however, McPherson's comment clearly addressed a matter of public concern.

Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern. Thus, the value of protecting her right to express her opinion, however loathsome, must be weighed against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

-4-

[4] We are persuaded that the government's interest in maintaining an efficient office does not outweigh the first amendment interest in protecting McPherson's freedom of expression. Her comment was made to a coworker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office.

[5] The government's strongest argument lies in Constable Rankin's contention that he should not have to employ *anyone* who "rides with the cops and cheers for the robbers." We understand this to mean that a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency. Just as a hospital has a legitimate interest in ensuring that its employees are not committed to euthanasia, so a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination. We therefore agree that Constable Rankin's action in dismissing McPherson was

based on an important and legitimate government interest.[2]

---

2. The government's interest in requiring that employees be loyal to the mission of the agency for which they work is somewhat different from the government's interest in limiting employees' criticism of their supervisors. The distinction can be illustrated by comparing this case with *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984). In *Yoggerst*, an employee of a state agency, after seeing newspaper reports that the agency's director had been fired, asked a co-worker, "Did you hear the good news?" After being disciplined for this remark, the employee resigned and brought suit pursuant to 42 U.S.C. § 1983. The Seventh Circuit held that the remark was not speech on a "matter of public concern" under *Connick*: "It is clear from the content of Yoggerst's statement that she was speaking *in her role as an employee* about her personal feelings and not in her role as a citizen on a matter of public concern. . . . The content of Yoggerst's speech was clearly about her relationship with the Director, a matter of no public concern; the fact that she spoke at a time when the Director's continued tenure in office was a matter of public interest does not alter this characterization." 739 F.2d at 296 (emphasis added) citation omitted). Thus, the result in *Yoggerst* was dictated by the central principle enunicated in *Connick*: the Constitution "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over *internal office affairs*." *Connick*, 103 S. Ct. at 1690, 1691 (emphasis added).

Unlike Yoggerst's comment, Ardith McPherson's remark had no direct bearing on internal office affairs and was made in her role as citizen rather than in her role as a public employee: her assassination remark was made in the context of a discussion of Reagan administration policies. This distinction may strike some as unduly artificial, for it is true that an acceptance of political assassination, like acceptance of the illegal overthrow of the government, reflects a generalized disloyalty to the very principles on which our public institutions operate. Any government official would properly be quite distressed to find his subordinates expressing such disloyalty, and we acknowledge that there are arguments for the proposition that the first and fourteenth amendments, properly interpreted, do not require government agencies to employ persons who are opposed to the fundamental principles on which our government is based. The Supreme Court, however, has rejected these arguments and foreclosed our consideration of them. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state may not constitutionally bar employment as public school teachers to persons who knowingly belong to organizations seeking the unlawful overthrow of the government); *Connick*, 103 S. Ct. at 1688-89 (reviewing related cases and reaffirming *Keyishian*).

[6] The difficulty with the government's position in this case, however, is that McPherson's duties were so utterly ministerial and her potential for undermining the office's mission so trivial. McPherson was one of about a dozen clerk-typists working in a closed room. She was not a law enforcement officer and she had none of the discretion or power associated with that position. Her job did not bring her into contact with the public, and the district court was not persuaded that she had any access to sensitive or important files. Were any of these factors different, we would have a different case. But in these distinct circumstances, we cannot say that McPherson could constitutionally be fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required. A large body of first amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our first amendment jurisprudence is a boast that in a free society foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considerd Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

REVERSED and REMANDED for determination of an appropriate remedy.

Supreme Court, U.S.
FILED
AUG 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2068

In The
Supreme Court of the United States
October Term, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,

Petitioners,

v.

ARDITH McPHERSON,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

ANNIE S. GARCY
GORDON QUAN & ASSOCIATES, P.C.
4848 Loop Central, Suite 800
Houston, Texas 77081
713/669-9902

GREATER HOUSTON CHAPTER
AMERICAN CIVIL LIBERTIES UNION
BRUCE V. GRIFFITHS
Counsel of Record
1236 West Gray
Houston, Texas 77019
713/524-5925

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

Neither decisions below nor the record raise the second question presented by petitioners. Respondent was employed only as a clerk-typist, and not as a "law enforcement officer." Petitioner Rankin is a Constable, not a "law enforcement officer," and has no direct law enforcement role.

To reflect the facts and the record accurately, the question in this case should be presented as follows:

> Does a Deputy Constable employed as a clerk-typist lose her constitutional right to speak out on matters of public concern merely because she is deputized?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	3
CONCLUSION	5
APPENDIX A	App. 1

TABLE OF AUTHORITIES

Page

CASES

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 505 n.22 (1984) 4

Connick v. Myers, 461 U.S. 138 (1983) 4

Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985, *cert. denied*, — U.S. —, 54 U.S.L.W. 3176 (U.S. Apr. 28, 1986) (No. 85-1234) 4

McBee v. Jim Hogg County, Texas, 730 F.2d 1009 (5th Cir. 1984) 4

Mt. Healthy City School Dist. Board of Ed. v. Doyle, 429 U.S. 274 (1977) 4

Perry v. Sindermann, 408 U.S. 593, 597 (1972) 4

Pickering v. Board of Education, 391 U.S. 563 (1968) 4

No. 85-2068

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On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

Respondent agrees with petitioners' reference to the opinions delivered below, and with petitioners' statement of grounds invoking jurisdiction of the Supreme Court, and with petitioners' statement of constitutional and statutory provisions involved.

STATEMENT OF THE CASE

This case concerns respondent's claim that she was terminated from her public employment in violation of her constitutionally protected right to freedom of speech.

There is no issue or question regarding the subject matter of respondent's statement, or regarding whether the statement is the basis for the termination of her employment. All parties agree that petitioners fired respondent strictly because of her statement. All parties agree that respondent's statement was, "I hope if they go for him again, they get him." The District Court specifically held that the statement did not constitute a criminal violation. (See Appendix A).

Neither the position that respondent held with the Constable's office nor the activities of the Constable's office were disrupted or interrupted in any way by respondent's comment. In fact, three witnesses testified that work continued during and after respondent's statement.

There is also no argument among the parties concerning the nature of respondent's employment. Despite petitioners' repeated efforts to characterize respondent as a "law enforcement officer," the record and evidence clearly establish respondent actually served only as one of a dozen clerk-typists. It is agreed among the parties that respondent was *not* a peace officer and was *not* trained in any "law enforcement" capacity. She simply fed information about the service of *civil* process into a pre-programmed computer system utilized county-wide to monitor the status of civil papers. She served no function within the criminal justice system, and the computers she

utilized also served no function within the criminal justice system. She worked in a back room, off limits to the general public. Respondent processed public information and did not work with sensitive information. She did not work directly or closely with the Constable.

Petitioners make much of the fact that respondent's job title was "deputy constable." In fact, the record reveals that the title of "deputy" is nothing more than an artifact of Texas law which permits constables to hire only "deputies."

In their Petition for Writ of Certiorari, petitioners continue to mischaracterize the constable's office as a "law enforcement office." Yet in trial, the Constable testified that over 80% of the functions of his office are devoted to service of civil papers, juvenile court services, and mental health warrants. The only criminal activity with which the Constable's office concerns itself is the service of warrants in petty misdemeanor cases, such as "bad" check cases. In fact, the Constable testified that no fingerprint checks or criminal clearances are required of clerk-typists hired by his office.

The Constable also testified that his precinct is located entirely within the city limits of Houston and neighboring cities, where city police and sheriff departments are responsible for law enforcement.

———o———

REASONS FOR DENYING THE WRIT

This case presents no special or important reason to grant the writ of certiorari. Respondent has broken no

new legal ground in this case; the First Amendment is a solid basis and legal precedent a convincing reason for denial of this petition.

The decision of the Court of Appeals for the Fifth Circuit faithfully follows precedent of the Court. *Connick v. Myers,* 461 U.S. 138 (1983); *Pickering v. Board of Education,* 391 U.S. 563 (1968). The Fifth Circuit decision is also consistent with the appeal court's application of *Connick. Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985) *cert. denied,* — U.S. —, 54 U.S.L.W. 3176 (U.S. Apr. 28, 1986) (No. 85-1234); *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1013 (5th Cir. 1984).

The Court has not retreated from its decision in *Connick.* See *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 505 n.22 (1984).

Respondent could not be fired from her public employment for exercise of her constitutional rights. *Mt. Healthy City School Dist. Board of Ed. v. Doyle,* 429 U.S. 274, 283 (1977); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972).

Whether respondent's statement is protected under the First Amendment is a question of law, but application of the decision of this Court in *Connick* is essential. If the comment made by respondent is deemed to concern itself with matters of public concern, then the speech is protected, and the balance between the employee's right to free speech and the employer's interest in a functioning public office must be struck. *Pickering v. Board of Education,* 391 U.S. 563 (1968). Respondent's comment clearly addressed a matter of public concern. Respondent's state-

ment concerned itself with her opinion of the political and economic policies of the administration of President Ronald Reagan. Her statement did not disrupt or interrupt the functioning of the office in which she worked.

Her statement in no way constituted a criminal offense, although it may be offensive to others. Petitioners violated respondent's right to freedom of speech under well established law.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

ANNIE S. GARCY
GORDON QUAN & ASSOCIATES, P.C.
4848 Loop Central, Suite 800
Houston, Texas 77081
713/669-9902

GREATER HOUSTON CHAPTER
AMERICAN CIVIL LIBERTIES UNION
BRUCE V. GRIFFITHS
Counsel of Record
1236 West Gray
Houston, Texas 77019
713/524-5925

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN and HARRIS COUNTY,
Defendants

ORDER

After careful consideration of the pleadings, especially Plaintiff's motion for summary judgment and Defendants' response thereto, the Court believes this case should be decided on cross-motions for summary judgment. Therefore, a hearing is hereby set for 9:30 a.m., on January 28, 1983. The purpose of the evidentiary hearing will be to determine whether Plaintiff's comment on March 30, 1981, pertaining to an assassination attempt on President Reagan, was protected speech.

The Court is convinced that Plaintiff's comment in no way constituted a violation of either 18 U.S.C. 2385 or 18 U.S.C. § 871(a). Therefore, to apply the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Court needs to hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in Plaintiff's position affects the ability of the constable's office to perform its services efficiently. The

Court is also concerned as to the applicability of *Weisbrod v. Donigan,* 651 F.2d 334 (5th Cir. 1981), rehearing denied, 659 F.2d 1079, and *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert. denied,* 439 U.S. 877 (1978).

Done at Houston, Texas, this 10th day of January, 1986.

/s/ Norman Black
United States District Judge

(3)

Supreme Court, U.S.
FILED
DEC 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

JOINT APPENDIX

ANNIE S. GARCY*
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

BRUCE V. GRIFFITHS
1236 West Gray
Houston, Texas 77019
(713) 524-5925

Attorneys for Respondent

MIKE DRISCOLL*
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners

*Counsel of Record

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

PETITION FOR CERTIORARI FILED JUNE 17, 1986

CERTIORARI GRANTED OCTOBER 20, 1986

140 PP

NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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JOINT APPENDIX

INDEX TO THE JOINT APPENDIX

		Beginning Page
1.	District Court's Docket Entries	1
2.	Plaintiff's Original Complaint	9
3.	Defense of Constable Walter Rankin	17
4.	Defense of Harris County	29
5.	District Court's Order and Final Judgment of April 15, 1983	34
6.	Court of Appeals' Opinion of July 12, 1984 (736 F.2d 175)	44
7.	Excerpts from Transcript of Proceedings of January 21, 1985	53
8.	District Court's Final Judgment of February 4, 1985	122
9.	Court of Appeals' Opinion of March 19, 1986 (786 F.2d 1233)	123

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One (1), of Harris County, Texas; and

HARRIS COUNTY, TEXAS,
Defendants.

REOPENED—4-17-86

CAUSE

Violation of 1st and 14th Amendments
42 U.S.C. 1983 and 1988

ATTORNEYS

Bruce Griffiths
Greater Houston Civil Liberties Union
1236 West Gray
Houston, Texas 77019
524-5925

Annie S. Garcy
4848 Loop Central Dr.
Suite 800
Houston, Texas 77081
669-9902

Both Defts

Billy E. Lee in charge
Dori Wind
Donald W. Jackson
Assistant County Attorney
634 Harris County Admin. Bldg.
Houston, Texas 77002
221-5101

DISTRICT COURT'S DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
6- 5-81	1	ORIGINAL COMPLAINT, filed.
6- 5-81	2	MOTION and ORDER appointing Ms. Abbey Padgett as process server, filed.
6- 5-81		SUMMONS (2) issued on Defts.
6-16-81		RETURN of Summons issued the following, filed. pj
	3	Harris County served by Pat Krischke f/Judge Lindsay on Jun 5, 1981.
	4	Walter Rankin served on Jun 15, 1981. DD 6-17-81
6-25-81	5	DEFENSE of Constable Walter Rankin, filed. pj DD 6-26-81
6-25-81	6	DEFENSE of Harris County, filed. pj DD 6-26-81
5-11-82	7	Pltf's FIRST REQUEST FOR PRODUCTION OF DOC. to defts., filed. aa
7-30-82	8	(NWB) ORDER, filed. Parties ntfd. PB Joint PTO due & Docket Call set for Sept 7, 1982, 9:30 a.m. dj Dkt'd 8-7-82
8-13-82	9	Pltf's MOTION FOR A SUMMARY JUDGMENT W/EXHIBITS, filed. aa
8-13-82	10	Pltf's MEMORANDUM OF LAW in support of motion for summary judgment, filed. aa M/D Sep 7, 1982, by clerk.

DATE	NR.	PROCEEDINGS
8-24-82	11	Pltf's MOTION FOR EXTENSION OF TIME in which to file pretrial order, filed. rj (unopposed) Dkt'd 8-30-82
9- 2-82		Rec'd and forwarded Pltf's Motion for Extension of Time. dd
9- 9-82	12	(NWB) Minutes of Chambers Conference, filed. Motion for Summary Judgment is under advisement as of 9-20-82. Amended DCO Discovery 12-1-82 Motions and PTO 12-15-82 Docket Call 12-27-82 dd Dkt'd 9-13-82
9-17-82	13	Deft. Rankin's OPPOSITION to Pltf's Motion for Summary Judgment. Filed. dd Dkt'd 9-21-82
9-24-82	14	Pltf's RESPONSE to Constable Rankin's Opposition to Motion for Summary Judgment. Filed dd
10- 8-82	15	Pltf's FIRST INTERROGATORIES to defts, filed. pj Dkt'd 10-15-82
10-25-82	16	Deft's RESPONSE to first set of interrogatories, filed. dm
12- 6-83	17	(NWB) ORDER, filed. Parties ntfd. pb/deg Cases listed set for Docket Call on Jan 3, 1983, 9:30 a.m.

DATE	NR.	PROCEEDINGS
		Pltf responsible for filing Joint Pretrial Order on or before Jan 3, 1983. Dkt'd 1-6-83
1- 3-83	18	(NWB) *MINUTES OF DOCKET CALL,* filed. aa (Rptr Starkie) Appearances: Pltf = Annie Garcy deft = Bill Lee ETT: 1 day trial to be set after ruling on MSJ.
1-10-83	19	(NWB) ORDER, filed, Parties ntfd. deg Hearings on cross-motions for summary judgment set for Jan 28, 1983.
2-14-83	20	(NWB) MINUTES OF HEARING, filed. (Rptr Schaefer) Appearances: Pltf-Annie Garcy, Steffan Presser; Deft-Billy Lee, Anthony Loira Presser; Deft-Billy Lee, Anthony Loria (1) Ardith McPherson, (2) Lawrence Jackson, (3) Hiedi Cornelison Hinojosa. Pltf rests. Deft's case begins. (1) Nell Sanford, (2) Capt. John M. LeVrier, (3) Capt. Jack Abercia, (4) Constable Walter F. Rankin. Defense Rests. Pltf's Motion for Judgent DENIED. Deft's Motion for Summary Judgment GRANTED. pb/dec Dkt'd 2-22-83
2-28-83	21	Pltf's REQUEST FOR FINDINGS OF FACT & CONCLUSIONS OF LAW, filed. dec Dkt'd 3-1-83

DATE	NR.	PROCEEDINGS
4-12-83	22	TRANSCRIPT of Feb 14, 1983 Hearing on Motion for Summary Judgment, filed. dec
4-15-83	23	(Vacated per order of 6-16-83)
4-15-83	24	(NWB) ORDER, filed. Parties ntfd. aa Dkt'd 4-21-83 FINDINGS OF FACT & CONCLUSIONS OF LAW. (claims denied)
6-14-83	25	Pltf MOTION for Extension of Time to File Notice of Appeal with Affidavit, filed. mac
6-16-83	26	(NWB) ORDER, filed. Parties ntfd. dec This Court's Final Judgment of Apr 15, 1983 is vacated and re-entered by Clerk on this date. Dkt'd 6-21-83
6-16-83	27	(NWB) FINAL JUDGMENT, filed. Parties ntfd. aa/dec Pltf's claims for relief are in all ways denied. Dkt'd 6-21-83
6-24-83	28	Pltf. NOTICE OF APPEAL to Final Judgment entered June 16, 1983, filed. mac
6-24-83		Filing & Docketing Fees both paid. (Rcpt. #77034) mac
7- 1-83		RECORD ON APPEAL consisting of all original papers (1 vol) and transcript (1 vol) sent to Ct of Appeals. tf (2 vols)

DATE	NR.	PROCEEDINGS
7- 5-83	29	APPEAL INFORMATION SHEET advising transcript already on file, filed. tf
8- 9-84	30	Certified copy of JUDGMENT by Court of Appeals on 7-12-84 and issued as MANDATE 8-3-84, VACATED, and that this cause be, & the same is hereby REMANDED to the said District Court in accordance w/the opinion of this Court; It is FURTHER ORDERED that defts-appellees pay to pltf-appellant the costs on appeal, filed. bb
8- 9-84	31	Certified copy of OPINION by Court of Appeals, filed. bb
8- 9-84		CASE REOPENED
8- 9-84		Record on Appeal RETURNED by Court of Appeals, file reassembled and place on Paul Brezik's desk. bb
9-11-84	32	(NWB) ORDER, filed. Parties ntfd. pb/dm 1. PRETRIAL CONFERENCE on Oct 2, 1984 at 9:00 a.m. Dkt'd 9-13-84
9-27-84	33	Pltf's NOTICE OF DEPOSITION set for Walter Rankin to be taken on Oct 26, 1984 at 1:00 p.m., filed. dm Dkt'd 9-27-84
10- 2-84	34	(NWB) MINUTES OF PRETRIAL CONFERENCE, filed. dm

DATE	NR.	PROCEEDINGS
		1. Discovery may continue until Nov 15, 1984. 2. Case will be ready f/trial thereafter. Set for trial 12/10/84 at 9:30 a.m. Dkt'd 10-4-84
1-15-85	35	Pltf's PRETRIAL MEMORANDUM on the First Amendment and Protected Speech, filed. dm
1-15-85	36	Pltf's PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW, filed. dm Dkt'd 1-15-85
1-21-85	37	(NWB) *COURT TRIAL, filed.* (Rptr J. Simon) dm Appearances: Pltf Bruce Griffiths & Annie Garcy; Deft Billy E. Lee. Pltf evidence begin. Pltf rest. Defts evidence begin. Deft rest. Final argument of pltf. Final Argument of deft. Court rules in favor of deft. ADJOURNED. Dkt'd 1-22-85
2- 4-85	38	(NWB) FINAL JUDGMENT, filed. Parties ntfd. dm 1. Judgment is entered f/defts. 2. Pltf's claims are denied. 3. Each party to bear their own costs. Dkt'd 2-4-85
2-15-85	39	Pltf's NOTICE OF APPEAL from Judgment entered on Feb. 4, 1985, filed. bb
2-15-85		Filing & Docketing Fee's BOTH paid # 110939. bb

DATE	NR.	PROCEEDINGS
3-11-85	40	Letter from Court of Appeals to Court Reporter (June Simon) advising transcript due for filing on Apr 26, 1985, filed. mac
5-22-85	41	Court Reporter's TRANSCRIPT OF PROCEEDINGS on Jan 21, 1985, filed. (1 Vol.) Paid & Dkt'd 5-31-85 mac
6- 3-85		RECORD ON APPEAL consisting of All Original Papers (1 Vol.) Transcripts (2 Vols.) forward to the Court of Appeals. bb
8-14-85	42	Deft's Trial EXHIBITS, filed. br. (per Paul B. instruction)
8-14-85		SUPPLEMENTAL RECORD consisting of Deft's Trial Exhibits forward to the Court of Appeals. br
4-17-86	43	Certified copy of JUDGMENT by Court of Appeals on Mar 19, 1986 and issued as MANDATE Apr. 15, 1986, REVERSING and REMANDING to District Court for further proceedings and FURTHER ORDERED that Defts-Appellees pay to Pltf-Appellant the costs on Appeal, filed. Dkt'd 4-18-86 mac
4-17-86	44	Certified copy of OPINION by Court of of Appeals, filed. mac
4-17-86		Record on Appeal RETURNED by Court of Appeals, reassembled and given to Paul as case is reopened. mac
4-17-86		CASE REOPENED. mac

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One (1), of Harris County, Texas; and
HARRIS COUNTY, TEXAS,
Defendants.

ORIGINAL COMPLAINT

I.

INTRODUCTORY STATEMENT

1. Plaintiff seeks to enjoin Defendants from conditioning continuing public employment on espousal of only those personal or political opinions and ideas found acceptable to the Constable. Plaintiff also seeks declaratory judgment and damages, based upon Defendants' violation of rights guaranteed her under the First Amendment to the Constitution of the United States, which guarantees the right to speech.

II.

JURISDICTION

2. Plaintiff alleges that Defendants' actions have deprived her of rights secured her under the First and

Fourteenth Amendments to the Constitution of the United States, and further assured to her by 42 U.S.C. §§ 1983 and 1988, and corresponding provisions under Texas laws.

3. Pursuant to 28 U.S.C. § 1343(3) and (4), this Court has jurisdiction of any civil action commenced by a party which seeks redress of deprivation, under color of any state law, regulation, custom, or usage, of rights secured by the Constitution or laws of the United States protecting civil rights.

4. Pursuant to 28 U.S.C. §§ 2201 and 2202, this Court has jurisdiction to declare the rights of the parties, and to grant all further relief found necessary and proper.

III.

PARTIES

5. Plaintiff ARDITH McPHERSON is an adult citizen of the United States, and resident of Harris County, Texas.

6. Defendant WALTER RANKIN is Constable of Precinct One (1) of Harris County, Texas. He is an elected official, and is sued both individually and in his official capacity as Constable. Defendant may be served with process at his office address at the Harris County Criminal Courts Building, 301 San Jacinto, Houston, Texas.

7. Defendant HARRIS COUNTY, TEXAS, is a county of the State of Texas, and process may be had by serving its statutorily designated agent for service, The Honorable Jon Lindsey, County Judge of Harris County, Texas, whose address is on the top floor of the Harris

County Administration Building, 1001 Preston, Houston, Texas.

IV.

COLOR OF LAW

8. At all times mentioned herein, all Defendants acted under color of the laws, statutes, customs, usages, and regulations of the State of Texas, of Harris County, Texas, and of the office of Constable, Precinct One, of said County.

V.

FACTUAL ALLEGATIONS

9. Defendant WALTER RANKIN as elected Constable of Harris County, Texas, is authorized to hire subject to approval by said County, through its Commissioners Court. TEX. REV. CIV. STAT. ANN. art. 6879a, § 2 (Vernon 1960).

10. Defendant RANKIN is obligated by statute to perform all duties as may be required of him by law. TEX. REV. CIV. STAT. ANN. art. 6885 (Vernon 1960).

11. Plaintiff ARDITH McPHERSON was hired by Defendant RANKIN on January 14, 1981, as a Deputy Clerk of Harris County, Texas. Her job duties concerned entry of information about civil process into the computer records of said County.

12. During her employment with Harris County, Texas, Plaintiff satisfactorily performed her work, and continues to be ready, willing and able to perform said job duties.

13. On Monday, March 30, 1981, an assassination attempt was made on the President of the United States.

14. Plaintiff first learned of the attempt as a result of a radio broadcast on said date, during a time that the Constable's office in which Plaintiff was sitting was emptied for lunch.

15. Upon hearing the news of the assassination attempt, Plaintiff and another employee of said Constable's office began a private discussion concerning the current administration of President Reagan, and its proposed budget reductions, and the employees discussed how proposed money cuts would generate anger in this Country.

16. During the course of said private discussion, Plaintiff stated to the other employee, "I hope if they go for him [President Reagan] again, they get him," and the conversation turned to other personal topics.

17. Said verbal statement made by Plaintiff was overheard by a Captain Levrier, and Plaintiff alleges on knowledge and belief that said Captain reported Plaintiff's statement to Defendant RANKIN.

18. Plaintiff meanwhile returned to her work, and continued to work at the computer terminal.

19. Shortly after, Plaintiff was summoned to Defendant RANKIN'S office by Deputy Constable Jack Albercia.

20. In Defendant RANKIN's office, said Defendant RANKIN informed Plaintiff that his office is "for Reagan," and further, that he would not tolerate expression of any opinions against President Reagan.

21. Plaintiff attempted to explain her comment, but Defendant RANKIN would not allow Plaintiff to respond.

22. Defendant RANKIN immediately thereafter terminated Plaintiff's employment with Harris County, and instructed an employee to remove Plaintiff's name from the payroll.

23. Plaintiff returned to the Constable's office the next day, to discuss her termination. Defendant RANKIN, however, would not speak with Plaintiff, and, after waiting for hours, Plaintiff abandoned hopes of speaking with Defendant RANKIN, and left the office.

24. Plaintiff alleges, on knowledge and belief, that sometime during the week of March 30, 1981, Defendant RANKIN informed the news media of the firing of Plaintiff based upon her spoken words, and said information was broadcasted and published in the media.

25. Plaintiff has attempted to regain her job position by contacting the Harris County Personnel Office, the Harris County Commissioners' Court, and the Harris County Attorney's office, all without success.

VI.

CLAIMS FOR RELIEF

26. Defendants' actions described above were arbitrary, capricious, and in willful violation of Plaintiff's freedom of speech, in that Plaintiff was terminated based upon expression of personal and political opinion, said expression being in the context of a private conversation, thus Defendants violated Plaintiff's rights under the First and Fourteenth Amendments to the United States Con-

stitution, and deprived Plaintiff of rights secured by 42 U.S.C. § 1983.

In publishing the termination of Plaintiff, Defendant RANKIN has wantonly caused Plaintiff public humiliation which has further caused Plaintiff grave mental anguish.

In terminating Plaintiff for her expression of free speech, Defendants have damaged Plaintiff's good name, reputation, honor, and integrity, all in violation of Plaintiff's right to liberty, guaranteed by the Fourteenth Amendment to the United States Constitution. Yet, Plaintiff has never received notice and an opportunity to be heard, and to refute or disprove Defendants' bases for terminating her employment, in violation of Plaintiff's right to due process of law, guaranteed by the same Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

RELIEF REQUESTED

Plaintiff requests that each Defendant be cited to appear and answer herein, that this cause be expedited for trial and that, upon trial of this action, the Court grant Plaintiff the following relief against Defendants, jointly and severally:

A. Adjudge and declare that Defendants' actions are in violation of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983; and

B. Incident to such declaration, and in exercise of its equitable powers, this Court order that Defendants reinstate Plaintiff to her job position; and

C. Order that Defendants publicize Plaintiff's reinstatement and advise the news media of such action; and

D. Award Plaintiff back pay for the time during which she was not employed by Defendants;

E. Permanently enjoin Defendants from conditioning employment with said Harris County, Texas, Constable's office on the expression of only those ideas found personally acceptable by said Defendant RANKIN;

F. Permanently enjoin Defendants from again summarily terminating employees with said Harris County, Texas Constable's office based on expression of ideas found personally unacceptable by said Defendant RANKIN, without notice and hearing; and

G. Award Plaintiff her costs of court and reasonable attorneys' fees; and

G. Grant such other relief as may be just and proper in the opinion of this Court.

Respectfully submitted,

/s/ STEFAN PRESSER,
Stefan Presser,
Attorney-in-Charge for Plaintiff
Greater Houston Civil Liberties Union
1236 West Gray
Houston, Texas 77019
713/524-5925

/s/ ANNIE S. GARCY
Annie S. Garcy,
Co-Counsel for Plaintiff
1110 Autrey
Houston, Texas 77006
713/523-7434

/s/ CHARLES A. BROWN
Charles A. Brown,
Co-Counsel for Plaintiff
608 Fannin, Suite 1710
Houston, Texas 77002
713/228-8000

OF COUNSEL:

AMERICAN CIVIL LIBERTIES UNION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
and HARRIS COUNTY, TEXAS

DEFENSE OF CONSTABLE WALTER RANKIN

MIKE DRISCOLL
County Attorney of
Harris County, Texas

DORI WIND
Assistant County Attorney

DONALD W. JACKSON
Assistant County Attorney

BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration
Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR DEFEND-
ANT CONSTABLE WALTER
H. RANKIN

FILED: 25 JUNE 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON

v.

CONSTABLE WALTER RANKIN
and HARRIS COUNTY, TEXAS

DEFENSE OF CONSTABLE WALTER RANKIN

Comes now Constable Walter H. Rankin, named and cited as one of the defendants in the above numbered and entitled cause in which plaintiff is Ardith McPherson. For his defense to the charges alleged against him in the Complaint defendant Constable Rankin would show unto the Court that:

I

Constable Rankin is the duly elected, qualified and acting Constable in and for Precinct No. 1 of Harris County, Texas, and was acting in such office and capacity at all times alleged in plaintiff's Complaint. Included in Precinct No. 1 is the downtown County Courthouse Complex. Housed here is the District Clerk, who issues all processes from the 30 District Courts that have civil jurisdiction; the County Clerk, who issues all processes from the 4 County Civil Courts at Law, the 3 Probate Courts, and Commissioners Court; and two Justices of the Peace, who issue all processes from their respective Justice Courts. As the only Constable housed in the down-

town County Courthouse Complex, this officer receives all processes from the respective issuing officials. This officer then enters the identifying information from each process into a Data Entry computer of the Harris County Civil Process Tracking Center, together with the date of its origination and the proper Constable's Precinct to which it will be routed for execution. After posting in the Data Entry computer, each process is then forwarded by this officer to the Constable in the Precinct in which it is to be executed. Each of the other seven Constables in Harris County has a terminal tied to the Data Entry computer in this officer's office and each adds to the computer history by entering all subsequent steps taken with each process paper through its execution and return to the issuing Court. The volume of Court processes handled each month by this officer exceeds 16,000, of which in excess of 6,000 papers are executed in his Precinct No. 1. To enable him to perform the duties of Constable in Precinct No. 1, Commissioners Court has authorized him to employ about 80 deputies and clerks. Of some 80 employees, more than 50 are deputies—certified law enforcement officers as defined by Legislative enactments. More than 20 persons are employed as clerks—answering the 15 telephone lines, sorting mail, secretaries, typists, bookkeepers, and computer clerks. This officer has need for 6 computer clerks and a supervisor working with the Data Entry input into the computer system of the Harris County Civil Process Tracking System.

II

On January 12, 1981, Ardith Sharese McPherson made application to this officer for employment as a clerk in his office. A contract of employment was signed by her

and this officer that same date, to become effective January 14, 1981. A xerox copy of the signed Application for, and Contract of, Employment is attached hereto as EXHIBIT A and incorporated herein by reference. In the center of said Contract, over the signature of plaintiff, is the following statement: "I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime."

Just below plaintiff's signature on the said Contract, is the following statement, with emphasis supplied by counsel drafting this pleading: "I, Walter H. Rankin, Constable, Precinct #1 of the County of Harris and State of Texas, HAVING FULL CONFIDENCE IN ARDITH S. McPHERSON of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners Court." The Deputation is dated and is signed by this officer in his official signature.

Next below the Deputation plaintiff subscribed to the Oath of Office which is prescribed by Section 1 of Article

XVI of the Texas Constitution, as quoted herewith in part, counsel drafting the pleading again supplying the emphasis: "I, Ardith S. McPherson, do solemnly swear (or affirm) that I will faithfully execute the duties of Clerk of Harris County, Texas, and WILL TO THE BEST OF MY ABILITY PRESERVE, PROTECT AND DEFEND THE CONSTITUTION AND LAWS OF THE UNITED STATES AND OF THIS STATE; . . ."

III

At Paragraph V, subparagraph 16, of her Complaint, plaintiff judicially admits that, in referring to the assassination attempt on the President of the United States in which he was shot, she stated to a fellow employee: "I hope if they go for him (President Reagan) again, they get him." When questioned by this officer concerning the statement, plaintiff repeatedly admitted that she had made that statement and that she meant the statement and did not intend to retract it. This all occurred on Monday, March 30, 1981. This officer discharged plaintiff as his employee that day, without Seniority. The Change in Status of Employee indicating plaintiff's discharge as of that date was sent to the County Auditor and Commissioners Court over this officer's signature. A xerox copy is attached hereto as EXHIBIT B and is incorporated herein by reference.

IV

Constable Rankin employed Ardith McPherson on the same terms and conditions that are adopted by him for all his other employees, namely, that every employee is employed only for a 90 day probation period. At the end of the 90 day probation period, if the Constable, in con-

sultation with his supervisory deputies, is of the opinion that the probationary employee is or is not doing the assigned duties efficiently, he either terminates the employee or makes the temporary appointment permanent. At the time Ardith McPherson was terminated she had two weeks of her probation period remaining. She was being still trained to do her work and had not reached the point of efficiency and skill that her assigned duties could be performed by her without constant direction and supervision. The Constable had no complaints as to the quality of the work done by Ardith McPherson. She was a slow learner, as evidenced by the fact that she was still unable to handle her assignment without direction after two and a half months of training. She was a marginal employee and would not have been retained after her 90 day probationary period unless she developed her job skills very rapidly in her last two weeks of the period. The position of putting information into the Data Entry terminal by a computer clerk is one that requires both accuracy and speed by the clerk, without the need for direction from the other clerks, who have their own duties to perform.

V

Constable Rankin has been in law enforcement work 36 years, a career devoted to suppressing crime and criminals. As a part of his law enforcement duties he has been called many times to furnish security to protect the persons of noted people visiting the City of Houston and Harris County, including the President of the United States, Governors, Mayors, Cabinet officers, candidates for high offices entitled to security protection, and heads of state from foreign nations. As is common knowledge,

security officers furnishing protection to notables share the risk of danger along with the person they are protecting. In fact, two security officers protecting President Reagan on March 30, 1981, were shot while in the performance of their official duty. The risk goes with the badge.

VI

The Penal Code of Texas proscribes criminal homicide and provides penalties for its violation. Section 2385 of Title 18 of the United States Code makes it a violation of law for anyone knowingly or willfully to advocate the desirability or propriety of the assassination of ANY officer of government in the United States. Ardith McPherson breached her constitutional oath of office that she would to the best of her ability preserve, protect and defend the Constitution and laws of the United States and of Texas when she knowingly, willfully and repeatedly advocated the desirability or propriety of the assassination of President Reagan. This officer has been a life-long Democrat and as such did not support or vote for President Reagan, but the President is the only President that he—and the nation—now has. Not only is it contrary to both statutory and natural law to kill him or attempt to kill him, but it is a major defeat to the small "d" democratic processes to have one small mind wipe out the expressed will of the majority of the nation to the cheers of a small—fortunately—lunatic fringe that can't cope with the democratic process.

VII

When Constable Rankin questioned Ardith McPherson and she repeatedly assured him of the words she had

uttered and that she meant them, he lost confidence in her and in her ability to function as an important part of a team of a law enforcement agency created to suppress crime and criminals. Under the deputation given her by his appointment she was empowered to do and perform any and all acts and things pertaining to the office of Constable in his name, place and stead. Having lost confidence in McPherson because of her advocacy of criminal acts, it was his duty to revoke the authority of his office he had bestowed on her temporarily, and he did so. He would be breaching his duty to the people who elected him to office to enforce the law if he kept in office as his deputy one who espoused violation of the law rather than suppression of crime.

WHEREFORE, defendant Constable Rankin prays that after a hearing the Court will render judgment that plaintiff Ardith McPherson take nothing by her suit against this officer and that he go hence without day with costs.

MIKE DRISCOLL
County Attorney of
Harris County, Texas

/s/ DORI WIND
Dori Wind
Assistant County Attorney

/s/ DONALD W. JACKSON
Donald W. Jackson
Assistant County Attorney

/s/ BILLY E. LEE
Billy E. Lee Lead Counsel
Assistant County Attorney
634 Harris County Administration Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR DEFENDANT CONSTABLE WALTER H. RANKIN

CERTIFICATE OF SERVICE

On this 25th day of June, 1981, I certify that I placed a signed true copy of the foregoing Defense of Constable Walter Rankin in the United States Mail Service with proper postable prepaid, addressed to each counsel of record for plaintiff:

Mr. Stefan Presser
Greater Houston Civil Liberties Union
1236 West Gray
Houston, TX 77019

Ms Annie S. Garcy
1110 Autrey
Houston, TX 77006

Mr. Charles A. Brown
608 Fannin, Suite 1710
Houston, TX 77002

/s/ BILLY E. LEE
Billy E. Lee
Assistant County Attorney

FOR AUDITOR'S USE ONLY:
Short Week Formula ___ Formula 2 ___
Car Allowance Formula ___
DATE EMPLOYED: (If other than effective date) / /

APPLICATION FOR, AND CONTRACT OF, EMPLOYMENT

☒ County Auditor / Commissioners' Court: County (County or Fixed Control) 2-06 (Budget Account)

Gentlemen:
I hereby apply for authority to make the following appointment, which is provided for by law and is essential to the efficient operation of this department, to become effective on 1 / 14 / 81 (Cannot be prior to approval by Auditor)

SOCIAL SECURITY NO. 098-56-3859
Name: Ardith Sharese McPherson (Name as full; no initials or abbreviations to be used) Ardith S. McPherson (Name desired to be used on County payroll and records)
Address: 12500 Dunlap #556 (Street and Number) Houston, Tx. 77035 (City) 728-1699 (Phone Number)
In emergency notify: Edith Melrose (Name) same (Address) 290-2474 Work
Statutory Authority For Appointment: 3912e-4D Duties: Clerical
☒ Title: Clerk Position Number: 0068 Period of Employment: Perm Rate of Salary: $ 1,079.00 per Month
☐ Replacement of: Anna M. Cardenas (Fill in "New Employment" or Name of Former Employee) Car Allowance Amount: $ ___
Room and Board Furnished: ___ (Enter: Yes or No)
Required Time: Minimum of 40 Hours a Week; on 8 Hours a Day; 5 Days a Week; ___ ("X" if as needed)
Automobile: (Check the condition applying to this position.)
The use of an automobile is not required X; the use of an automobile is required (a) County to furnish transportation ___; (b) Employee to furnish and maintain his personal car ___.
☒ Special Conditions or Remarks: ___

Length of residence in Harris County: 6 months Date of Birth: 2 / 24 / 61 Male (1) 3 Female (2) ___ Married (3) 5 Single (4) ___ White (5) 6 Black (6) ___
Education: 3 & 4 (Indicate whether (1) None; (2) Grammar School; (3) High School; (4) College Courses, Incomplete; (5) College Courses Complete (name degree); (6) Post Graduate Work; (7) Business College.)
Previous Employment by Harris County: ___ (Your previous exact name and initials) ___ (Department)
From: / / To: / / (DATES OF PREVIOUS EMPLOYMENT BY HARRIS COUNTY, AND WHETHER PERMANENT OR TEMPORARY)

Payment under this employment for its duration, if temporary, or for the remainder of the year will require $ ___ from Harris County funds as allocated to the budget of this department. I understand and agree that the authority to make the appointment herein applied for, if granted, shall not extend beyond December 31 of the current year unless renewed by the Commissioners' Court and any other approving authority and provided for in the succeeding year's budget. The rules and conditions recited above, the personnel regulations adopted by the Commissioners' Court, and the statutes relative to this position are to govern this employment.

Witness my hand at Houston, Texas this January 12, 19 81
Walter H. Rankin (Signature of Employer)
Constable, Precinct #1 (Title) of Harris County, Texas.

I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer, without notice, without vacation, and without payment for overtime.
I certify that the statistical and personal data shown above are correct.
January 12, 19 81
Ardith S. McPherson (Signature of Employee)

DEPUTATION
(Deputation and Oath of Office are to be filed in duty for those positions for which they are required by law.)

THE STATE OF TEXAS, COUNTY OF HARRIS. I, Walter H. Rankin (Officer), Constable, Precinct #1 (Title)
of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson (Name) of the said County and State, do hereby, with the consent of the Commissioners' Court of said County, Texas, duly entered of record ___, 19 ___, nominate and appoint him, the said Ardith S. McPherson Constable, Precinct #1 (Title) my deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 (Title) of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue hereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the January 12 Court.
Witness my hand at Houston, Texas, this ___, 19 81
Walter H. Rankin (Signature)
Constable, Precinct #1 (Title) of Harris County, Texas.

OATH OF OFFICE
I, Ardith S. McPherson Clerk, do solemnly swear (or affirm), that I will faithfully execute the duties of ___ of Harris County, Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States ___ of this State; and I, furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, no... ...mised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the appointment to the above named position. So help me God.
Subscribed and sworn to before me at Houston, Texas, this January 12, 19 81.
Verna Mae (Notary Public in and for Harris County, Texas)
Ardith S. McPherson (Deputy)

CERTIFICATE OF COUNTY AUDITOR
Budget provision has been made, and funds are or will be available to meet claims for payment of compensation lawfully accruing under the above employment not to exceed $ ___ for year, with which I have encumbered Budget Account ___ (Department). Distribution 450, this ___, 19 ___.
Calculated: ___ Personnel Clerk
Posted To Form 1083: ___
Posted: ___ Appropriation Ledger Operator
Appropriation Ledger Posting Checked: ___
___ County Auditor, Harris County, Texas.

NOTE: Payment will not be made of any compensation claimed hereunder prior to the execution of the Auditor's certificate.
INSTRUCTIONS: This form is to be filled in duplicate, executed by the employer and by the employee, and submitted to the Commissioners' Court. By agreement, the County Auditor will check the form and budget and execute his certificate prior to action by the Court or other approving authority. After action by the Court or other approving authority, the County Clerk is to retain the original and refer the copy to the Auditor with the County Clerk's certificates on the reverse side fully executed to show the action of the Commissioners' Court and the reference to the record of the Dep...

COUNTY AUDITOR'S FORM 2418-1-C
HARRIS COUNTY, TEXAS

CHANGE IN STATUS OF EMPLOYEE

[5] [1]

County — COUNTY OR FLOOD CONTROL
2-06 — BUDGET ACCOUNT

Ardith S. McPherson — EMPLOYEE'S NAME

098,56,3359 — SOCIAL SECURITY NO.
03/30/81 — EFFECTIVE DATE (INCLUSIVE)

FOR AUDITOR'S USE ONLY
SHORT TIME FORMULA / FORMULA 2
CAR ALLOWANCE FORMULA /
EMPLOYEE STATUS CHANGE . . .

County Auditor
Commissioners' Court
Gentlemen:

Approval is requested of this application to alter the original contract of employment to the extent of the changes set out below, the original contract to remain in effect in all other respects:

CHANGES FOR PERSONNEL RECORDS OF THE COUNTY AUDITOR:

NATURE OF CHANGE	FROM	TO
Change in Name ** . . . . . ** ATTACH FORM "REQUEST FOR CHANGE IN SOCIAL SECURITY RECORDS"		
Change in Statute Governing this Employment		
[4] Auditor's Remarks		

CHANGES SUBJECT TO THE APPROVAL OF THE COMMISSIONERS' COURT:

[2] Change in Title	Clerk	
Change in Position	NUMBER 0068	NUMBER
	REPLACEMENT OF:	
Temporary Employment Extended	/ /	/ /
Change in Longevity	$	$
[3] Change in Salary	$ 1,208.00 PER month	$ PER
Change in Car Allowance . . . . . (or room and board if specified)		
Change in Required Time	40 HOURS PER WEEK	HOURS PER WEEK
	8 HOURS/DAY 5 DAYS/WEEK 'X' IF AS NEEDED	HOURS/DAY DAYS/WEEK 'X' IF AS NEEDED
Change in Status	(ACTIVE, INDEFINITE LEAVE, TEMPORARY LEAVE)	(ACTIVE, INDEFINITE LEAVE, TEMPORARY LEAVE)
Change in Temporary Leave Expiration Date	/ /	/ /
Transfer (FROM AND TO ACCOUNTS MUST BE UNDER SAME DEPARTMENT HEAD)		

Termination of Employment: Discharged without Seniority

Resigned, Discharged w/o Seniority, Discharged with Notice, Discharged with Severance Pay and Unused Vacation, Temp. Employment exp., Employment exp., Position Abolished, Retired, Medically Retired, Deceased

The requested change(s), if approved, will require the following adjustment of the budget encumbrance made for this employment under Distribution 450: None ____ ; Add $ ____ , Deduct $ ____

The change(s) above set out is/are accepted by me, with the understanding that in all other respects the original contract of employment is to remain in full force and effect.

Very truly yours,

Walter L. Franks
(SIGNATURE OF EMPLOYEE)

(EMPLOYEE)

Constable, Precinct #1
(TITLE) Harris County, Texas

CERTIFICATE OF COUNTY CLERK

This Change in Status was approved by the Commissioners' Court on _____ , 19 ____ , as shown in Volume _____ , Page _____ , of the Minutes of the Commissioners' Court.

_____
COUNTY CLERK, HARRIS COUNTY, TEXAS

(Seal)

By _____ , Deputy

CERTIFICATE OF COUNTY AUDITOR

This Change in Status is accepted. Funds are or will be available to meet claims for payment of compensation lawfully accruing under the contract of employment as hereby amended.

The following adjustment of the encumbrance for this employment against Distribution 450, Budget Account _____ , _____ (Department) in accordance with the terms of this Change in Status has been made: None ____ .

Add $ _____ , Deduct $ _____

Calculated _____ , Personnel Clerk

Posted To Form 1083 _____

Posted _____ , Appropriation Ledger Operator

_____
COUNTY AUDITOR, HARRIS COUNTY, TEXAS

INSTRUCTIONS: This form is to be typed in a duplicate executed by the employer and by the employee (on changes except termination or retirement), one copy to be retained by the department and the original and other copy submitted to the Clerk of the Commissioners' Court if the change is one which requires the approval of the Court, otherwise to the County Auditor. Changes subject also to the approval of the Juvenile Board are to be submitted by the Clerk of the Court to the Juvenile Board.

The Auditor shall examine all changes to check the form and budget and execute his certificate prior to action by the approving authority. After action by the

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

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and HARRIS COUNTY, TEXAS

DEFENSE OF HARRIS COUNTY

MIKE DRISCOLL
County Attorney of
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DORI WIND
Assistant County Attorney

DONALD W. JACKSON
Assistant County Attorney

BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration
Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR
DEFENDANT HARRIS
COUNTY, TEXAS

FILED: 25 JUNE 1981

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HOUSTON DIVISION

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an HARRIS COUNTY, TEXAS

DEFENSE OF HARRIS COUNTY

Comes now Harris County, Texas, named and cited as one of the defendants in the above numbered and entitled cause in which plaintiff is Ardith McPherson. For defense to the charges alleged in her Complaint defendant Harris County would show unto the Court that:

I

Harris County denies that it asserts any control or authority over Constable Walter H. Rankin or his office. Constable Rankin is independently elected by the people who reside in Precinct No. 1 of Harris County, Texas. Constable Rankin manages his office in accordance with the statutes promulgated by the Legislature of the State of Texas to govern the duties and the performance thereof by all Constables in Texas. In the conduct of his office as Constable, Constable Rankin is not carrying out any policy of Harris County, or of Precinct No. 1 of Harris County, but is carrying out State policy of the State of Texas prescribed through its Legislature.

II

Harris County denies that it asserts any control or authority over any deputy or clerk appointed by Constable Rankin to assist him in the performance of his official duties as Constable. In subsection (h) of Section 19 of Article 3912e, Vernon's Texas Civil Statutes, the Legislature of the State of Texas expressly provides "that in no case shall the Commissioners' Court or any member thereof attempt to influence the appointment of any person as deputy, assistant, or clerk in any office." This provision has uniformly been construed as likewise prohibiting any attempt to influence the termination of the employment of any person as deputy, assistant, or clerk in any office. It is expressly denied that Harris County, acting by its Commissioners Court, in any way attempted to influence Constable Rankin in his appointment or termination of employment of Ardith McPherson.

III

No where in her complaint does plaintiff Ardith McPherson allege a single fact against Harris County which would sustain an award of damages against the County or which would warrant injunctive relief against the County. Plaintiff having failed to allege any facts against Harris County for which relief can be granted, Harris County moves for judgment on the pleadings as provided by Rule 12(c), Rules of Civil Procedure.

WHEREFORE, defendant Harris County prays the Court to dismiss this suit for failure to state a claim upon which relief can be granted and moves the Court, pursuant to Rule 12(c), Rules of Civil Procedure, to render

judgment on the pleadings that plaintiff take nothing by her suit of this defendant.

MIKE DRISCOLL
County Attorney of
Harris County, Texas

/s/ DORI WIND
Dori Wind
Assistant County Attorney

/s/ DONALD W. JACKSON
Donald W. Jackson
Assistant County Attorney

/s/ BILLY E. LEE
BILLY E. LEE Lead Counsel
Assistant County Attorney
634 Harris County Administration Bldg.
Houston, TX 77002
(713) 221-5101

ATTORNEYS FOR
DEFENDANT HARRIS
COUNTY, TEXAS

CERTIFICATE OF SERVICE

On this 25th day of June, 1981, I certify that I placed a signed true copy of the foregoing Defense of Harris County in the United States Mail Service with proper postage prepaid, addressed to each counsel of record for plaintiff:

Mr. Stefan Presser
Greater Houston Civil Liberties Union
1236 West Gray
Houston, TX 77019

Ms Annie S. Garcy
1110 Autrey
Houston, TX 77006

Mr. Charles A. Brown
608 Fannin, Suite 1710
Houston, TX 77002

/s/ BILLY E. LEE
Billy E. Lee
Assistant County Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

FINAL JUDGMENT

Based upon the findings of fact and conclusions of law entered this date, and pursuant to Fed. R. Civ. P. 58, judgment is hereby entered for Defendant. Plaintiff's claims for relief are in all ways denied.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed April 15, 1983)

ORDER

This is a suit alleging wrongful termination of employment in violation of Plaintiff's First Amendment rights of free speech. It is agreed that but for Plaintiff's statement on March 30, 1981, Plaintiff would not have been discharged on that date. There being no jury question to be decided, a hearing was held on February 14, 1983, to determine whether Plaintiff's speech was protected. Based upon the pleadings and evidence, the Court now makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff Ardith McPherson is an adult citizen of the United States of America, and is a resident of Harris County, Texas.

2. Defendant Walter Rankin is the elected Harris County Constable for Precinct One (1). He is sued both individually and in his official capacity as Constable.

Defendant Harris County is a political subdivision of the State of Texas.

3. Defendant Walter Rankin, as elected Constable of Harris County, Texas, is authorized to hire employees subject to approval by said County, through its Commissioners' Court. Tex. Rev. Civ. Stat. Ann. art 6879a § 2 (Vernon 1960).

4. Defendants at all times mentioned herein acted under color of state law.

5. Plaintiff Ardith McPherson was hired by Defendants on January 14, 1981, as a Deputy Constable of Harris County, Texas.

6. As a Harris County Deputy Constable, Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct.

7. Defendant Walter Rankin employed Plaintiff for a ninety-day probationary period. At the time Plaintiff was terminated, she had two weeks of her probationary period remaining.

8. Plaintiff's application for employment, County Auditor's Form 3405, dated January 12, 1981, read, in part:

> I have read, understand, and accept the terms and conditions of this employment as recited above and in the personnel regulations adopted by the Commissioners' Court. I understand that my employment may be terminated at will by my employer without notice, without vacation, and without payment for overtime.
>
> I certify that the statistical and personal data shown above are correct.
>
> January 12, 1981. (Signed) Ardith S. McPherson

9. The Deputation portion of Form 3405, signed by Constable Rankin the same date read:

> I, Walter H. Rankin, Constable, Precinct #1, of the County of Harris and State of Texas, having full confidence in Ardith S. McPherson of the said County and State, do hereby, with the consent of the Commissioners' Court of Harris County, Texas, duly entered of record _____, 19____ nominate and appoint him, the said Ardith S. McPherson, my true and lawful deputy, in my name, place and stead, to do and perform any and all acts and things pertaining to the office of said Constable, Precinct #1 of the County and State, hereby ratifying and confirming any and all such acts and things lawfully done in the premises by virtue thereof. Payment of payrolls is to be in accordance with the personnel regulations adopted by the Commissioners' Court.
>
> Witness my hand at Houston, Texas, this January 12, 1981.
>
> (signed) Walter H. Rankin
> Constable, Precinct #1

10. Plaintiff's notarized oath of office, also on Form 3405 read:

> I, Ardith S. McPherson, do solemnly swear (or affirm), that I will faithfully execute the duties of Clerk of Harris County, Texas, and will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and of this State; and I, furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward

for the appointment to the above named position. So help me God.

Subscribed and sworn to before me at Houston, Texas, this January 12, 1981.

(Signed) Ardith S. McPherson

11. Pursuant to Texas law, all employees of the Constable's office, regardless of job function, are deputy constables and must give the prescribed oath of office. See Vernon's Rev. Civ. Stat. Ann. art. 6879a and 6879b.

12. On March 30, 1981, during the lunch hour, Plaintiff and some other employees heard on an office radio, an announcement of the assassination attempt on President Reagan. Plaintiff concluded a discussion with a coworker about that event and about Reagan administration economic policies with the statement, "I hope if they go for him (President Reagan) again, they get him."

13. The statement was overheard by Captain Levrier, a Deputy Constable, who reported the incident to Constable Rankin. When summoned to Constable Rankin's office, and in the presence of the Constable, Captain Levrier, and Captain Abercia, Plaintiff confirmed that she made the statement in issue.

14. Plaintiff testified that she told Constable Rankin, "Yes, but I didn't mean anything by it." Plaintiff claims her statement did not signify an actual intent on her part to harm or to participate in harming the President.

15. Constable Rankin, Captain Levrier, and Captain Abercia each testified that Plaintiff repeated the statement in the Constable's office. The Constable testified that when he asked her whether she meant it, Plaintiff replied, "I sure do."

16. Constable Rankin instructed his secretary to take Plaintiff off the payroll immediately.

17. When Plaintiff returned the next day seeking an interview with the Constable, he refused to see her.

18. Constable Rankin testified that he lost all confidence in the Plaintiff's ability to be a Deputy Constable and as an employee of a law enforcement agency when she repeated (or acknowledged) her statement. He informed her there was no place for her in that office. He considers it a violation of one's sworn duty to uphold the U. S. Constitution and the laws of the State of Texas to espouse the assassination of any president, judge, or other public official. In his judgment, people would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed if he retained an employee who endorsed such actions.

19. The Court finds that, regardless of the seriousness of Plaintiff's intent, the fact that she did make such a statement while on the job indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee. The Constable sincerely and earnestly believes that an individual possessing an attitude such as Plaintiff's is not a suitable employee of a law enforcement agency.

Conclusions of Law

1. This Court has jurisdiction of this case alleging a violation of Constitutional rights under color of state law pursuant to 28 U.S.C. § 1331.

2. A probationary employee such as Plaintiff McPherson may be fired for any reason, or even for no reason—

but not for the exercise of her constitutional rights. *Perry v. Sinderman,* 408 U.S. 593, 597 (1972); *Van Ooteghem v. Gray,* 628 F.2d 488, 490 (5th Cir. 1980), on rehearing *en banc,* 654 F.2d 304 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982); *Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1077 (5th Cir. 1976).

3. A public employee's private speech, as well as her public statements, may be protected. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410 (1979).

4. While public employment which may be denied altogether may not be subjected to unreasonable conditions, it is clearly established that the State has interests as an employer that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

5. An agency may regulate speech only as far as necessary to accomplish a legitimate government interest: to promote efficiency; to foster loyalty and obedience to superiors; to maintain morale; to instill public confidence in the law enforcement institution. *Gasparinetti v. Kerr,* 568 F.2d 311, 315-16 (3d Cir. 1977), *cert. denied,* 436 U.S. 903 (1978). Also see, *Kannisto v. City and County of San Francisco,* 541 F.2d 841 (9th Cir. 1976); *Muller v. Conlisk,* 429 F.2d 901 (7th Cir. 1970).

6. In certain instances a public employee may be discharged on the basis of speech without offending the First Amendment. *Arnett v. Kennedy,* 416 U.S. 134, 160 (1974).

7. In determining the free speech rights of a public employee, the Court must engage in a three-step analysis:

(a) Is the communication protected;

(b) If so, did it play a substantial part in the decision to fire the plaintiff;

(c) If so, would the employer have fired the employee even if the protected communication had not occurred. *Wilson v. Taylor,* 658 F.2d 1021, 1027 (5th Cir. 1981), citing *Mt. Healthy City School District v. Doyle,* 429 U.S. 274, 287 (1977) and *Pickering, supra; Van Ooteghem, supra* at 491.

8. In the case *sub judice,* the second and third prongs of the test are admitted by Defendant; only step one is in issue.

9. Whether the communication is protected is a question of law to be determined by the Court. *Van Ooteghem, supra,* at 492.

10. To determine whether the communication of a public employee was protected, the Court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Pickering, supra,* at 568.

11. Plaintiff has the burden of establishing that her speech was protected. *Mt. Healthy v. Doyle, supra.*

12. In balancing these interests, the Court may consider such factors as the need for maintaining discipline by immediate supervisors, the need for harmony among co-workers, the necessity for personal loyalty and confidence between the employer and employee, the disruption to the workplace caused by the speech, and the

public's need or right to comments and information from public employees on matters of general concern. See *Pickering, supra,* at 570; *Barrett v. Thomas,* 649 F.2d 1193 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 1969 (1982); *Van Ooteghem,* 628 F.2d at 492; *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980).

13. In striking the *Pickering* balance regarding private expression, a Court should consider the content and manner, the time and place of the speech. *Givhan, supra,* at 415, n.4.

14. In the case at bar, Plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, Plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the Plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

15. The Court concludes that the application of the *Pickering* balancing test shows Plaintiff's speech to be clearly unprotected.

16. Additionally, an employee cannot claim First Amendment protection for speech-related conduct where the ground for discharge was not the speech itself, but because it evidenced character traits undesirable in an employee. *Weisbrod v. Donigan,* 651 F.2d 334, 336 (5th Cir. 1981), *rehearing en banc denied,* 659 F.2d 1079; *Garza v. Rodriguez,* 559 F.2d 259 (5th Cir. 1977), *cert.*

denied, 439 U.S. 877 (1978); *Megill v. Board of Regents of the State of Florida,* 541 F.2d 1073 (5th Cir. 1976). Also see *Phillips v. Adult Prob. Dept., City & Cty of San Francisco,* 491 F.2d 951 (9th Cir. 1974).

17. The Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifiest qualities of character that accentuate the high standards of the field of law enforcement. See *Megill, supra* at 1085.

18. It was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as Plaintiff's, at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions.

19. Plaintiff McPherson's First Amendment rights were not violated by her discharge.

Done at Houston, Texas, this 15th day of April, 1983.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

Ardith McPHERSON,
Plaintiff-Appellant,

v.

Walter RANKIN, Individually and In His Official Capacity As Constable, Precinct One of Harris County, TX and Harris County Texas,
Defendants-Appellees.

NO. 83-2399.

United States Court of Appeals,
Fifth Circuit.

July 12, 1984.

Former deputy constable brought suit against constable and county, alleging she was denied her rights secured by First and Fourteenth Amendments when she was fired by constable for a political remark she made to a co-worker during a private conversation. The United States District Court for the Southern District of Texas, Norman W. Black, J., entered summary judgment in favor of constable and county, and former deputy constable appealed. The Court of Appeals, Tate Circuit Judge, held that substantial issues of material fact existed as to "context" in which statement was made, including whether deputy constable admitted to constable that she seriously meant what she said regarding attempted assassination of President and was not speaking in political hyperbole, precluding summary judgment.

Vacated and remanded.

Appeal from the United States District Court for the Southern District of Texas.

Before TATE, JOLLY, and DAVIS, Circuit Judges.

TATE, Circuit Judge:

The plaintiff, Ardith McPherson, a non-tenured deputy constable[1] formerly employed by the defendant Constable of Harris County, Texas, appeals from the grant of summary judgment against her in her 42 U.S.C. § 1983 suit against Constable Walter Rankin and Harris County, Texas. The plaintiff McPherson alleges that she was denied her rights secured by the First and Fourteenth Amendments when she was fired by the Constable for a political remark made to a coworker during a private conversation. Finding that the existence of substantial issues of material fact made summary judgment inappropriate, we vacate the judgment in favor of the defendant Walter Rankin, and remand for a full trial on the merits.

On March 30, 1981, during lunch hour, McPherson and a coworker, after hearing of an assassination attempt on President Reagan, engaged in a brief, private conversation about their opposition to the President's policies on welfare and unemployment. The plaintiff concluded the discussion with the statement: "I hope if they go for him [President Reagan] again, they get him."[2]

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1. McPherson was employed as a deputy clerk whose primary responsibility was to enter civil papers into a computer. Her duties were limited to clerical jobs. She did not wear a uniform nor was she authorized to carry a weapon or make arrests. She had no contact with the public other than occasionally answering the office telephone.

McPherson was hired for a ninety-day probationary period. At the time she was fired, two weeks of her probationary period remained.

2. The district court's version differs slightly from McPherson's accounting of what exactly was said. McPherson testified at the summary judgment hearing that she said, "[I]f they go for him again, I hope they get him."

A deputy constable overheard this statement and reported it to Constable Rankin who summoned McPherson to his office. McPherson admitted to the Constable that she made the statement. A genuine dispute exists in the factual showing, however, over whether she also admitted that she actually intended the remark as seriously made.[3] Constable Rankin then summarily fired the plaintiff.[4]

McPherson then in June 1981 sued Constable Walter Rankin and Harris County, alleging a violation of her constitutional rights under color of state law. 42 U.S.C. § 1983. Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, McPherson filed a motion for summary judgment. The defendant Constable Rankin responded and requested a dismissal, claiming that McPherson failed to state a cause of action upon which the court could grant relief. The district court considered the parties' opposing motions as cross-motions for summary judgment, and it ordered an evidentiary hearing, which was held on February 14, 1983, to determine whether the plaintiff's speech was protected under applicable First Amendment principles. Following the hearing, the district court granted summary judgment in favor of the defendant Walter Rankin; McPherson appeals.

[1] In reviewing a district court's grant of summary judgment, we are required to consider the evidence pre-

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3. Of the four persons present in Constable Rankin's office—Constable Rankin, Chief Deputy Abercia, Captain LeVrier, and Ardith McPherson—Rankin and LeVrier claim McPherson said she meant the remark, while Abercia did not recall whether Constable Rankin asked the plaintiff whether she meant what she said. McPherson argues that she pointedly told the Constable, "I didn't mean anything by it."

4. McPherson testified that she returned the following day to try to explain what she meant to the Constable, but was denied an interview.

sented in the light most favorable to the party opposing the motion. *Simon v. United States,* 711 F.2d 740, 743 (5th Cir. 1983). Hence, the factual recitals in the opponent's affidavit as well as hearing testimony of McPherson and her witnesses must be regarded as true for the purposes of this appeal.

[2, 3] If there is a genuine issue of material fact which would cause a dispute to reasonably be resolved in favor of the party resisting the summary judgment, the summary judgment cannot stand. *National Hygienics, Inc. v. Southern Farm Bureau Life Insurance Company,* 707 F.2d 183, 186 (5th Cir. 1983). That the movant appears to the court more likely than not to prevail at trial is no reason to grant summary judgment; it is not the province of the trial court on motion for summary judgment to weigh evidence, assess its probative value or decide factual issues. *Byrd v. Roadway Express, Inc.,* 687 F.2d 85, 87 (5th Cir. 1982). The standard is simply that the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

[4] Prior to its ruling granting summary judgment in favor of the defendants, the trial court ordered a hearing so that it could "hear testimony regarding the details of this incident, the intent and motivation of those involved, and the extent to which such speech by one in plaintiff's position affects the ability of the constable's office to perform its services efficiently." In determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations including the "manner, time, and place in which it is de-

livered," and the intention of the speaker. *Bickel v. Burkhart,* 632 F.2d 1251, 1256-57 (5th Cir. 1980).

In this instance, the statement was made by McPherson during the lunch hour in a conversation between McPherson and her boyfriend, a coworker. The conversation took place in a non-public computer room of the constable's workforce; only two other regular coworkers in the room were present at that time, and one of them that testified stated that she did not overhear the conversation when it took place. However, the conversation chanced to be overheard by a deputy constable, who had entered the computer room to pick up papers to take to other precincts. He immediately reported the conversation to the Constable Rankin, the defendant, precipitating the events and McPherson's discharge at issue.

At the evidentiary hearing, Ardith McPherson testified that her statement—"if they go for him again, I hope they get him"—was intended only as a verbal expression of her anger with the Reagan administration's social and economic policies. The plaintiff maintained that "it is just like if I ask my sister to pick me up somewhere and she's late and I say, 'Where is she,' and I said 'Wait till she get[s] here, I'm going to kill her.' That don't mean I'm going to kill her with a gun or knife or weapon. It is an expression of conversation." Hence, the essence of McPherson's contention is that her statement was merely a form of political hyperbole and was not intended to advocate harm to the President.

McPherson also testified that when confronted by Constable Rankin, she assured him that she "didn't mean anything by it," but was not allowed to further explain her comment to him. Constable Rankin testified that

when he asked Ms. McPherson whether she meant what she said, her reply was "I sure do."

[5] The issue of McPherson's intent[5] is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its "content, form, and context". *See Connick v. Myers,* ____U.S.____ ____, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), cited with approval in *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1013 (5th Cir. 1984) (factors include employee's motives in voicing the expressions at issue and their context).

[6] Thus, in a § 1983 suit brought by a public employee against his public employer, the "manner, time,

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5. With regard to peripheral issues: In its order of January 10, 1983, the district court stated that it was "convinced that plaintiff's comment in no way constituted a violation of either 18 U.S.C. § 2385 or 18 U.S.C. § 871(a)." Section 2385 provides for federal conviction for one who intentionally advocates the overthrow of the government. To violate section 871(a), one must "intelligently make a statement, either written or oral, in a context and under such circumstances that a reasonable person would forsee that the statement would be interpreted by persons hearing . . . it as a serious expression of intention to inflict bodily harm upon or take the life of the President." *United States v. Rogers,* 488 F.2d 512, 514 n. 3 (5th Cir. 1974), *rev'd on other grounds,* 422 U.S. 35, 95 S. Ct. 2091, 45 L.Ed.2d 1, *on remand* 519 F.2d 1084 (5th Cir. 1975).

It is not necessary to prove an intention to carry out the threat under section 871(a), *id.,* 488 F.2d at 514, but is necessary to prove a "true threat." In *Watts v. United States,* 394 U.S. 705, 708, 89 S. Ct. 1399, 1401, 22 L.Ed.2d 664 (1959), the Supreme Court found that the defendant's statement "if they ever make me carry a rifle the first man I want in my sights is L.B.J." was not a true threat, but a form of political hyperbole. Watts' "only offense . . . was 'a kind of very crude offensive method of stating a political opposition to the President.' " *Id.* at 708, 83 S. Ct. at 1402.

McPherson's intent is, however, significant in the present *civil* case, as a relevant factor in the overall context of the statement.

and place" of a statement, and the "context" in which it is made, as revealed by the whole record, is relevant to the determination of whether the statement is protected under the First Amendment. *Id.* ____U.S. at ____, 103 S. Ct. at 1693.

The context of the speech is especially material when private expression is involved. In *Bickel v. Burkhart,* 632 F.2d 1251, 1257 (5th Cir. 1980), this court noted that when a public employee expresses himself publicly, the primary focus is on the content of his speech; however, where private expression is involved, the balancing test encompasses the manner, time and place in which it is delivered as well as the context in which the statement is made. *See Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 n. 4, 99 S. Ct. 693, 696 n. 4, 58 L.Ed.2d 619 (1979).

The court's task is to fully consider each of these factors in applying the *Pickering* (*infra*) balancing test, which compels us "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968).

Based upon the testimony evinced at this hearing, the court issue an order on April 15, 1983, in which it concluded:

> The plaintiff's comment did not disrupt the workplace in general. There was no criticism of her immediate superiors. However, the comment clearly undermined

> her employer's confidence in her as one of his deputies whose public comments and actions during work hours he would be deemed to have ratified. Further, plaintiff's comment in no way served the public's interest in matters of general concern. While made during the noon hour, the comment was made in the office while at least some employees, including the plaintiff, were working or as they returned to work from lunch, and loud enough to be overheard by nearby co-workers.

Offering no further reasons for its determinations,[6] the court concluded that McPherson's speech was unprotected under the *Pickering* balancing test.

[7] As to the intent or motivation of the plaintiff, the trial court merely noted the discrepancy in the testimony regarding McPherson's intention in making the statement. The district court was, of course, unable to make a finding on this issue because of conflicts in the testimony on this material issue. Indeed, it is not the district court's function on a motion for summary judgment to resolve any genuine issue of material fact or make determinations as to the credibility of witnesses, but instead the court must consider the facts presented and resolve all doubts in the light most favorable to the non-moving party. *See Williams v. Shell Oil Company*, 677 F.2d 506, 509 (5th Cir.), *cert. denied*, 459 U.S. 1087, 103 S. Ct. 570, 74 L.Ed.2d 933 (1982).

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6. The court ostensibly engaged in an three-step analysis derived from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286, 97 S. Ct. 568, 575, 50 L.Ed.2d 471 (1977):
   1. Is the communication protected?
   2. If so, did it play a substantial part in the decision to fire the plaintiff.
   3. If so, would the employer have fired the employee even if the protected communication had not occurred?

[8, 9] On a motion for summary judgment, the moving party must demonstrate that the facts underlying all relevant legal questions raised by the pleadings or otherwise are not in dispute, or else summary judgment should be denied. Fed. R. Civ. P. 56(c). As noted above, we perceive that substantial issues of material fact existed as to the "context" in which the statement was made,[7] including whether McPherson admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole.[8]

The issues presented in this case would more properly be resolved after a trial on the merits because we find the existence of substantial issues of material fact. We, therefore, VACATE the district court's summary judgment and REMAND for a full trial on the merits.

VACATED AND REMANDED.

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7. The court further held that McPherson's discharge was justified because her "speech-related conduct . . . evidenced character traits undesirable in an employee." If the plaintiff's speech was unprotected, then, under the terms of her contract as a non-tenured employee, she was terminable at will without notice by her employer. The justification for the discharge thus enunicated is necessary only if she was discharged for the exercise of protected speech.

Should, on remand after a full factual hearing, the district court determine that the plaintiff's speech was indeed protected, the court will then have to apply the remaining factors of the test expressed in *Mt. Healthy, see* note 8, *supra*. For instance, when an employee is fired, not for the content of what he has said, but for undesirable character traits evidenced by the speech, he may have no claim to First Amendment protection from the discharge. *See Garza v. Rodriguez,* 559 F.2d 259, 260 (5th Cir. 1977), *cert. denied,* 439 U.S. 877, 99 S. Ct. 215, 58 L.Ed.2d 191 (1978) (drunken, belligerent behavior accompanied by abusively foul language); *Megill v. Board of Regents of State of Florida,* 541 F.2d 1073, 1085 (5th Cir. 1976) (false and misleading public statements, profanity, disruption of public meetings).

8. Relevant to McPherson's due process claim implicated by her complaint, is the Constable's refusal, both on the day of the incident and the following day, to allow McPherson to explain herself.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

Houston, Texas, January 21, 1985

ARDITH McPHERSON,
Plaintiff,

vs.

WALTER RANKIN, Individually and in his official capacity as Constable, Precinct One (1), of Harris County, Texas; and Harris County, Texas,
Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

APPEARANCES:

For The Plaintiff:
Ms. Annie S. Garcy
Mr. Bruce Griffiths

For The Defendants:
Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:
June Simon

INDEX

PLAINTIFF'S WITNESSES	Page
Walter H. Rankin	
Direct Examination by Mr. Griffiths	9
John M. Levrier	
Direct Examination by Mr. Griffiths	49
Jack Abercia	
Direct Examination by Ms. Garcy	61
Ardith Sharese McPherson	
Direct Examination by Ms. Garcy	64
Cross-Examination by Mr. Lee	87
Redirect Examination by Ms. Garcy	93
Examination by the Court	94
Thomas Kochman	
Direct Examination by Mr. Griffiths	95
Cross-Examination by Mr. Lee	130
Lawrence Jackson	
Direct Examination by Ms. Garcy	137
DEFENDANT'S WITNESS:	
Walter H. Rankin	
Direct Examination by Mr. Lee	148
Cross-Examination by Mr. Griffiths	153

* * *

[9]

Constable Walter Rankin.

The Court: All right. Constable Rankin.

Mr. Griffiths: Your Honor, at this time the Plaintiff would invoke the rule.

The Court: All right. Are there any persons in the courtroom who may testify in the case, other than the Plaintiff herself?

Mr. Griffiths: We have two witnesses here, Your Honor. I believe there are two witnesses.

The Court: All right. Let's stand, if you will, please, and be sworn.

(All witnesses present in courtroom duly sworn.)

The Court: Would you all please wait in the hall until you are called to testify, and not discuss your testimony with each other or anyone else except the attorneys in the case.

Walter H. Rankin, Plaintiff's witness, sworn

DIRECT EXAMINATION

By Mr. Griffiths:

Q. Constable Rankin, would you state your name for the record, please.

A. Walter H. Rankin.

Q. And you are, sir, the elected Constable of Precinct 1 of Harris County, Texas? Is that correct?

A. Yes, sir.

[10]

Q. Precinct 1 of Harris County, Texas is a district which encompasses part of but not all of the county; is that right?

A. That is correct.

Q. And is it true that that precinct is wholly within the city limits of the City of Houston?

A. Well, we have had new boundaries changed within —I'm not exactly sure of that. Most of it is.

Q. Okay. And back in 1981 when the facts surrounding this lawsuit occurred, was it in the same situation, as all or mostly within the city limits of Houston?

A. No. There's other parts of some other cities that it covers, and it could be some more in the county. I'm not sure just exactly it's all, but the majority of it is inside the city limits of Houston.

Q. Okay. It is, in fact, the Constable's precinct which encompasses downtown Houston, for example?

A. Yes, sir.

Q. And moves out from there, generally speaking?

A. Yes, sir.

Q. How many precincts are there within Harris County, Texas? Constable precincts?

A. Eight.

Q. Do you have any idea what the population of Precinct 1 is?

A. Probably 350,000.

[11]

Q. And most—is there any part of it which is totally unincorporated? That is, has no city having jurisdiction over it?

A. I don't recall.

Q. But it's true, is it not, that substantially all of your precinct has other law enforcement departments who are charged with the day-to-day enforcement of the criminal laws in that area? Is that right?

A. Yes. We all do.

Q. All right. And, in fact,—okay. Let me back up. As the elected constable, you are elected by popular vote, the citizens of the precinct; is that correct?

A. Yes, sir.

Q. And you are elected on a partisan ballot every how many years?

A. Every four years.

Q. And you were elected, were you not, as a democrat?

A. Yes, sir.

Q. And what is the number of employees that were in your employ as Constable of Precinct 1 back in the spring of 1981?

A. I believe it was 82 or 83.

Q. And I take it that as an elected public official, you are the person with full responsibility for the operation of the Constable's office of Precinct 1?

[12]

A. Yes.

Q. And the only authority that anybody—any other officials have over you is that the county attorney's—I mean the County Commissioner's Court gives you money, passes—levies taxes and makes appropriations to your department; is that right?

A. They give me money for my salary. They appropriate money for my budget.

Q. And are there any other sources of income for your

department? In other words, do you collect any of the fees for services?

A. All of the money collected goes into the general funds.

Q. Okay. But your salary is—when you say they give you your salary, they are required to by law, to pay you the salary that is set?

A. Yes.

Q. And for other employees of the department other than yourself, the County Commissioner's Court does have some control over how many there are, because they are the ones who appropriate money to pay you?

A. Set their salaries and appropriate the money for the employees for that department.

Q. Okay. Would you say that you are, in essence, the policy making official for the Precinct 1 Constable's office?

A. Well, I make the policy. I guess you would say I see that

[13]

the laws are enforced and the duties are carried out.

Q. You don't answer to any other county officials as your supervisor?

A. Well, I answer to the Commissioner's Court for deals. I answer to the auditor's office to be sure that all fees are collected. And I think that everyone answers to someone. I certainly answer to the public.

Q. All right. That certainly wasn't a well-phrased question. But in the hierarchical sense, there is nobody in a chain of command that is above you? That is your superior officer?

A. Well, I would say that the Commissioner's Court would be in the point because if I did not carry out my

function, certainly they could reduce staff, they could reduce—they would have lots of control.

Q. Fundamentally whether or not you hold your office is dependent on the will of the people of Precinct 1; is that correct?

A. That is correct.

Q. And you may—you have a relationship with the commissioners in the same sense that, for example, the governor has a relationship to the legislature, or the President has a relationship with Congress, that they have some powers that you don't have, and you have some powers that they don't have; is that right?

[14]

A. I have a relationship with all peoples of Harris County and the state.

Q. Commissioner's Court can't fire anybody for not—in your department because they don't think they are doing their job; right?

A. Well, they may not fire them, but they could eliminate the position.

Q. They could eliminate a position, but you could decide who filled that position; is that right?

A. Well, if a certain position would be—if they came in and eliminated that certain position there, then that position would be gone.

Q. And the person who held that position, you could hire the next day for another position; is that right?

A. Yes, if I had the position.

Q. Right. Or if you wanted to fire somebody else to put them in that position because you thought the person whose position was eliminated would do a better job than somebody else that was on the staff in the position that hadn't been eliminated.

A. Well, you are getting in a very technical—I don't have a desire to fire anybody; to have someone else because they are—

Q. My point is that you make the personnel decisions. They tell you—

[15]

A. Yes.

Q. —You can have X number of positions in your department, and you are the one that determines how they are filled; is that correct?

A. Yes. They are to please me and carry out the functions, the guidelines. But we run the office.

Q. And you were the one—you were the person who made the decision to dismiss Ardith McPherson; is that correct?

A. Yes.

Q. And it was not a matter of the County Commissioner's Court eliminated her position, it was a matter of you decided that she would no longer serve in that position.

A. I was the one that lost confidence in her.

Q. The functions of the Precinct 1's Constable Office as it exists in Harris County, or as it existed in 1981—one of the major functions of that office was to serve civil papers that are generated by the various courts of Harris County; is that correct?

A. That carries a lot to do with it, yes.

Q. And, in fact, your office is sort of the central distribution mechanism for civil papers in Harris County. That is, if I file a lawsuit, the papers will go to your office, even if they are to be served in somebody else's precinct; is that correct?

A. Yes, sir.

[16]

Q. And somebody in your office has the job of finding out which precinct they are to be served in, and making sure they get to that precinct?

A. Yes, sir.

Q. About what percentage of your—well, back up. Your office also has the function of serving papers for the juvenile courts of Harris County; is that right?

A. Yes, sir.

Q. And one of the things that juvenile courts handle in this Harris County system is juvenile delinquency cases; is that right?

A. That's correct.

Q. So you go out and serve papers on juveniles who are accused of delinquency, or your people do?

A. Whatever the courts—whatever the court order is. We carry out the order of the court.

Q. Okay. And occasionally you arrest juveniles for violation of criminal laws, who are too young to be prosecuted as adults; is that correct?

A. If the court does allege that we bring them before them, we bring them before the court.

Q. Another function of your office is to execute what are called mental health warrants; is that right?

A. That's correct.

Q. And that is essentially when a court of competent

[17]

jurisdiction—which would be the probate courts in Harris County—determine that a person is a danger to himself or others because of mental disease, and go through the appropriate procedure, they issue a warrant that authorizes you to go out and arrest this person to be held in a mental health facility?

A. We don't class it arrest them, we class it as being in custody and carrying it to the psychopathic ward, to hold them until they have the hearing. But we don't class it as being arrested.

Q. What percentage of your budget would you say is devoted to carrying out those three functions that I have just described? That is, the civil paper service, the juvenile court service, and the mental health warrants?

A. A great percentage.

Q. More than 80 percent, would you say?

A. Yes.

Q. Your department does not have officers assigned to patrol cars to patrol the streets of your precinct, do they?

A. No, sir.

Q. One of your statutory duties is to serve essentially as the bailiff and the arm—wing of the justice of the peace courts for your precinct; is that right?

A. Yes, sir.

Q. And so you essentially do anything that requires a law

[18]

officer, in connection with the operation of those courts; is that right?

A. We carry out any function in law enforcement that I deem necessary or would be an aid to help to the citizens of Harris County.

Q. Okay. But I'm not asking what you have the power to do. I'm asking what in fact you did do back in 1981. And while you may have had the power to put people out in patrol cars, you deemed it unnecessary to put deputies out in patrol cars.

A. We were not doing it.

Q. And that's because you decided not to do it?

A. That's right.

Q. Some other constables in this county in fact at that time were putting deputies out in patrol cars.

A. Yes.

Q. So the function in connection with the justice of the peace court, the justices of the peace courts have both civil and criminal jurisdiction; is that right?

A. Yes, sir.

Q. Their criminal jurisdiction, however, is limited to crimes for which no jail sentence may be assessed. Is that an accurate assessment?

A. I'm not going to go on the—what the courts do. We carry out the orders of the court, regardless of what it is.

[19]

Q. How long have you been a constable in Precinct 1?

A. Since January 1st of 1965.

Q. Okay. Almost—well, 20 years now; is that right?

A. Yes, sir.

Q. And it's true, isn't it, that in your experience, justice of the peace courts in Precinct 1 only handle criminal cases that are classified as Class C misdemeanors; is that right?

A. Yes, sir.

Q. And Class C misdemeanors are crimes under the Texas Penal Code which have as a maximum penalty a $200 fine; is that correct?

A. Yes, sir.

Q. And, in fact, within the City of Houston, there is a system of municipal courts; is that right?

A. Yes, sir.

Q. And the system of municipal courts also has jurisdiction over—concurrent jurisdiction with justice of the

peace court, Precinct 1, to hear crimes involving Class C misdemeanors or other offenses which have a penalty of no more than $200 fine?

A. I'm not involved in the court system between the J.P. courts and the municipal court. Mine is carrying out the orders of the court, and I work with them, as I do with the district judges and district attorney's office, on all crimes.

[20]

Q. How long did you work with the Houston Police Department?

A. Eighteen and a half years.

Q. And when you were working with the Houston Police Department, was there a system of municipal courts in existence? City of Houston Municipal Courts?

A. Repeat?

Q. Was there, during the time that you worked with the City of Houston Police Department, a system of municipal courts in place for the City of Houston?

A. Yes, sir.

Q. And when Houston Police officers during that time arrested somebody for a violation of an ordinance or a Class C misdemeanor, that case was filed in the City of Houston Municipal Court, was it not?

A. Yes, sir.

Q. And as far as you know, that situation hasn't changed, has it?

A. No, sir.

Q. Okay. So if a Houston police officer arrests somebody for a Class C misdemeanor, he will, as a matter of department policy, file his case with the Municipal Court of the City of Houston; is that right?

A. I presume so.

Q. And you have already testified that your precinct is primarily within the city limits of the City of Houston;

[21]

is that right?

A. With other cities.

Q. Okay. What other cities?

A. Part of Bellaire and part of West University, and—

Q. Southside Place?

A. Yes, sir.

Q. Okay. West University has a municipal court, does it not?

A. Yes, sir.

Q. And police officers employed by the City of West University Place file their Class C misdemeanor cases in municipal court, do they not?

A. Yes, sir.

Q. Your answer?

A. Yes, sir.

Q. And that is also true of Bellaire and Southside Place, is it not?

A. Yes, sir.

Q. So the effect of that is that most of the criminal cases within Precinct 1 of Harris County which might fall within the jurisdiction of the justice of the peace courts are in fact filed by other police agencies and municipal courts within that district; is that right?

A. You mean the other cities?

Q. I'm saying Houston and the other cities, when they arrest

[22]

somebody, they file their cases in municipal court.

A. I presume they do. I have never really been interested where they were filing them. That was their responsibility.

Q. Okay. But the effect of that is that the case load of the justice of the peace's—justices of the peace for Precinct 1 are primarily civil; is that not true?

A. No.

Q. Why not?

A. Well, because they take criminal cases on warrants or different things that are filed in those courts.

Q. Okay. Bad checks are in fact the primary criminal prosecutions that take place in those courts, are they not?

A. Well, we have lots of them coming through there.

Q. The majority—the vast majority of criminal cases in justice of the peace courts are in fact bad check cases in Precinct 1?

A. I am not going to testify, counselor, what their case loads are on the different ones, because I have no way of knowing.

Q. Twenty years as constable, and you can't even make a generalization to the effect of what most of their criminal case work is?

A. I am not going to speak for the courts. I'm telling you I do not check their record. I have no right to go into their office and check their record. I am interested in the

[23]

records and the function that I have, that goes through my office.

Q. Okay. Well, let's talk about what you do, then. You understand when I talk about the difference between a civil case and a criminal case? You understand the distinction I'm making, do you not?

A. Yes, I do.

Q. Okay. And civil papers—juvenile courts and mental health warrants all fall in the category of civil papers, do they not, under Texas law?

A. Repeat it all over again.

Q. Civil summonses and civil process, mental health warrants, and juvenile proceedings are all considered civil proceedings under Texas law?

A. Some juvenile proceedings that we have, ones that we pick up may be criminal, but the others, yes, the majority of them are civil.

Q. And, in fact, even when you arrest a juvenile as a juvenile deliquent, or taken pursuant to a writ issued by the juvenile court, that is technically denominated a civil proceeding, is it not? Or a juvenile delinquency proceeding?

A. I would have to look at the court order to read what the court said, whether it's to be classed as that.

Q. What percentage of criminal papers or criminal activity—

[24]

strike that.

What percentage of your deputies' activities are involved in arresting people on or doing anything with writs that have come out of criminal courts? I mean adult criminal courts?

A. Well, regardless of whatever the papers that we might get from the district attorney's office to assist them from other sheriff's departments and our sheriff's departments, or constable's office in this county or other constable's offices in other counties, on arrest warrants, or whatever help that they might be asking for that we provide this.

Q. Okay. What percentage of your office's activities are involved in serving criminal—executing the criminal warrants, or serving criminal court's subpoenas, or doing any of that?

A. Most of our percentage is with civil papers and hot check warrants.

Q. Now, I believe that you previously testified that on occasion, your office has been assigned to guard visiting dignitaries who visit Houston.

A. We have been requested many, many times to assist, and we do.

Q. Is that something which, when you—let me ask you this: When you assign a deputy to work that kind of assignment, is that a regular assignment that he is required to perform, or

[25]

is that like an off-duty job that he has the option of accepting or rejecting?

A. We can have either way we want to do it. We assign them because working with the other agencies of the seriousness of the protection.

Q. So is your answer that sometimes it's an off-duty job, and sometimes it's a regular assignment?

A. If it falls through the hours there that the man is on duty, we use them anyway, or furnish people for protection of anyone when the time might call upon it. I'm not going to worry about civil papers or something if somebody needs protection, I'm going to assign the personnel that I am comfortable with.

Q. Okay. Have you ever had occasion to supply deputies for dignitary protection where they were taking it as an outside job, and somebody else was paying them other than Constable Rankin's office?

A. I would not allow my personnel that furnishes security for anyone to come in here if they was on duty, to accept money from anybody.

Q. Well, suppose it was at a time period when they weren't on duty. In other words, I presume that since you don't do street patrol and you don't have a jail of your own that you man—is that correct?

A. The only time they would ever accept money for a deal,

[26]

if it would be for a private party, but for certainly not protecting the property or people that are coming into this city that we are requested to assist the Houston Police Department, Department of Public Safety, or—no way do they ever accept money.

Q. Okay. And that is on whatever shift they are working, they work to guard that person?

A. Well, I can use them any shift that I want to, counsel. My hands are not tied. That is a position that I will have to take, because our officers and myself, we are not clock watchers. We go when the time is needed, we use the personnel when it's needed. And I would hate to know that I was furnishing security where someone needed help, and it's time for them to get off, and I would say, hey, we can't furnish you anymore. So we are not clock watchers. We are not going to worry about whether a man—as long as my duties are kept up and we can assist other people in other departments, we will do that.

Q. When you assigned a dignitary—back up. One more thing. There is no portion of your precinct that doesn't have some other agency that is responsible for day-to-day law enforcement within its area, is there?

A. All law enforcement agencies work together, coun-

selor. We don't look at boundary lines when it comes to protection of citizens.

[27]

Q. I'm not talking about guarding dignitaries. I'm saying if we say that day-to-day law enforcement involves having policemen out in patrols looking for crime taking place and responding to emergency calls and so forth, you don't do that at present, and you didn't do that in 1981, did you?

A. No.

Q. Okay. And there is no portion of your precinct where there isn't another agency that in fact does that work, has people on patrol looking for crime, responding to emergency calls?

A. Well, Counselor, if I wanted to put automobiles on the street and put marking, and start patrolling the city of Houston, there is nothing to keep me from it.

Q. I understand that.

A. I just don't do it.

Q. You don't do that because the sheriff is patrolling the unincorporated areas of the county, and the various municipal police departments are patrolling within their city limits; it that correct?

A. And other constables.

Q. Yes, sir. Okay. The people who work for you, I believe you testified in the prior proceeding, are all deputy constables. That is their title; is that correct?

A. Yes, sir.

Q. And here in the State of Texas, we have a statewide

[28]

procedure for commissioning peace officers; is that not also correct?

A. Yes, sir.

Q. And for someone to be a certified peace officer within the State of Texas, it is required that he undergo a certain amount of background check; is that right?

A. That is the law.

Q. It's also required, I believe, that he have some psychological exam; is that right?

A. Yes, sir.

Q. It's required that we have a course of study in law enforcement; is that correct?

A. Yes, sir.

Q. How many hours is that?

A. Well, since I serve on the commission of law enforcement standard education for the State of Texas—I have served six years, and I have just been appointed again to serve six more years—we are always—right now it's 320 hours, but I have just made the motion the last commission that we raise it up to 400 hours.

Q. So it's a substantial amount of training?

A. Yes, sir.

Q. And you think—your suggestion is that they need a little bit more?

A. I don't think that any of us has enough training.

[29]

Q. Very good. And in order to—let me ask you this: it's against the law in Texas, except under certain circumstances, for somebody to walk around with a handgun on their person; is that right?

A. Yes, sir.

Q. That doesn't apply to commissioned peace officers, does it?

A. No, sir.

Q. In fact, that is one of the things that a commission entitles you to do, is to walk around with a side arm?

A. Well, the commission doesn't do it. The law provides officers to be on duty 24 hours a day, if necessary.

Q. But if you don't have a commission, you are not a peace officer under the law?

A. May not be a peace officer, but you would be a deputy. Like in my office, the clerks and everyone else are still deputies, which I can design certain functions or work that they can do in my name. They—well, just take for granted just started out, took the oath for the next four years. After every four years, we all regive the oath of office again, which I just got through on January 2nd. Everyone takes the same oath of office because of the nature of the work, the function that we do.

Q. And a deputy who is not a commissioned peace officer would not be sent out armed to enforce the laws of the

[30]

State of Texas on the streets, would he?

A. No, sir.

Q. And he certainly would not be sent out to guard the President of the United States or any other visiting dignitary, would he?

A. No, sir.

Q. Now, do you have any idea how many civil papers come into your office to be either served or distributed to somebody else to be served every year?

A. I don't have the figures with me. Probably 200,000 or more.

Q. Very many papers?

A. Yes, sir.

Q. Okay. And Harris County being a large metro-

politan area, it's no longer possible to serve civil papers by sticking them in cubbyholes and hoping that the deputy will pick them up and carry them out and be served. This is an automated office that you operate; is that correct?

A. Very much so.

Q. And you have—do you have your own computer system, or do you have access to the county?

A. County.

Q. And the computer system is supposed to keep a record of wherever any paper that has been issued by every court in Harris County is at any given time?

[31]

A. Yes, sir.

Q. So that if I'm an attorney here in town and I have Mary Ellen's divorce filed, and I want to know why papers haven't been served on her husband yet, I can call your office and somebody will answer the phone, punch the name up on a computer, and tell me where the papers are; is that right?

A. Five to six seconds, we can give you the information you need counselor.

Q. How many people do you have or did you have working in early 1981 whose job was essentially to type data into that computer system?

A. Possibly about—at that time probably 16, 17. I don't recall just exactly. The staff has grown since then.

Q. And their job was to take these civil papers, look at the names of the parties, look at the cause number, look at what court it was out of, address, lawyer, all this important data, and type that into the memory of the county computer; is that—

A. If that is the assignment I put them on, that would be it. Whatever assignment I give them, that's what their assignment is.

Q. Those people who carried guns while they were typing, they didn't carry them to use them, did they?

A. No, sir.

[32]

Q. And, in fact, those jobs are not jobs that you require somebody to be a commissioned peace officer to fill?

A. No, sir.

Q. There are some jobs that you would require somebody to be a commissioned peace officer before they could be assigned to it; is that right?

A. Yes, sir.

Q. What jobs are those?

A. Serving civil papers, serving warrants, serving the mental warrants, carrying out writs of all types of the court, execution, and so on and so forth.

Q. And so essentially, anything where you are going to leave that office and go out and present yourself as the representative of the governmental power of the State of Texas, you are going to have to be a commissioned peace officer?

A. Just like every other peace officer in the state, yes, sir.

Q. Exactly.

The Court: Mr. Griffiths, I hate to interrupt you, but I am going to have to step out for a few minutes and select a jury in another case. We are going to do it across the hall so you all can stay in your place.

Constable Rankin, if you would like to step down and just take it easy for a few minutes, this shouldn't

[33]

take more than 20 minutes or so.

(Jury selected in other case.)

The Court: Okay. Be seated, please. The jury is selected in the other case. We are ready to go back to work here.

Mr. Griffiths: May I proceed, Your Honor?

The Court: Yes, sir.

By Mr. Griffiths:

Q. Mr. Rankin, I believe you testified earlier that you are elected on a party ticket; is that correct?

A. Yes, sir.

Q. So you have, for the 20 years that you have been constable of Precinct 1, been selected as a Democrat; is that correct?

A. That's correct, sir.

Q. Would you consider that your office essentially is a partisan political office?

A. Counselor, in the work I do, I don't care whether a man is Democrat, Republican or an Independent. It's just that we don't look at that. We carry out the enforcement of the laws, and I don't think law enforcement has a party.

Q. Okay. And political opinion is not a prerequisite to getting a job in your office?

A. I have Democrats working for me, I have Republicans working for me. I don't ask them which party they belong to.

[34]

Q. So someone with—who was either for or against

the Reagan Administration could still work in your office, notwithstanding their opinion on that subject?

A. I don't ask them how they vote or who they vote for, Counselor.

Q. The people who work for you are all deputy constables, but the jobs that they do are different jobs. I think we have already talked about that. First of all, what do you call, in terms of job description, the job of taking data off the court papers and putting them into the computer system?

A. I call them deputies assigned to clerical positions.

Q. And when you hire somebody for a job, clerical position, it's true, is it not, that you do not require them to be a commissioned law enforcement officer?

A. No, sir. But if they so request later on, want to go to school, then I'll assist them in training, which I have done in the past, which I am doing now.

Q. Okay. But that is not a prerequisite to employment in one of these clerical jobs?

A. No, sir.

Q. And, in fact, when Ardith McPherson applied for a job in your office, she was not required to undergo the psychological testing, for example, that a peace officer is required to undergo before he gets commissioned as a peace

[35]

officer?

A. No, sir.

Q. And she wasn't required to submit to a polygraph test, was she?

A. No, sir.

Q. And she wasn't required to take 300-odd hours of training as a law enforcement officer?

A. No, sir.

Q. And I presume that you did not require her to do those things because you didn't think that that was necessary for her to perform her job.

A. Well, she wasn't there long enough for me to evaluate her on doing any job. She had only been there a short time, and—

Q. My question is, you made the determination that people who were hired to do the job that Ardith McPherson was hired to do, would not be required to undergo the screening or training that a peace officer would be required to undergo.

A. No unless she proved her desire, or wanted to go further up into law enforcement. Then she would have.

Q. So the decision of a deputy constable who is not a peace officer, to become a peace officer, is a voluntary one on that deputy's part?

A. Well, I'm not going to force someone to get in law enforcement if they don't have a desire, sir.

[36]

Q. And it's not a condition for keeping the job as a deputy constable?

A. Not unless they enforce the laws on the street. Not for—some particular assignment.

Q. Okay. The area—I take it you are familiar with the physical area of your office in which Ardith McPherson was working on March 30, 1981.

A. Yes, sir.

Q. You know where that was in your office?

A. Yes, sir.

Q. Could you describe that for me real briefly.

A. Just a large office with lots of CRT terminals for

about—I guess I had about ten or 12 people working in that particular area.

Q. Okay. Is that an area to which the general public has uninvited access, or unlimited access?

A. Well, they can go in. I don't close any part of my office off to anyone. I have tried to keep as much traffic off as possible in there, but as far as saying, no, they don't go in there, I don't have a restricted area.

Q. Okay. So that is not a reception area of your office?

A. No.

Q. And jobs of the women or the people who were working in that office was not to deal directly with the public as it presented itself to the people?

[37]

A. Well, they do deal directly with the public. When an attorney would come in to where there are questions on service or something, then they are carried back there where the supervisor there would go and look through, and so, no. They can come on in and work, and get whatever information they need.

Q. Okay. Well, let's clarify this. Back in March of '81, if an attorney came into your office, where was that office located at that time?

A. At that time, it was 300. Our suite number was 300. But I have moved since then. I have larger space.

Q. I understand that, but at that time, you were on the third floor of the Harris County Criminal Courts Building; is that correct?

A. Yes, sir. I still am.

Q. And if an attorney walked into your office there would be somebody there whose task was to ask him what his business was, or if anybody came in, to ask him what his business was; is that right?

A. We have a reception area there to assist anyone, yes.

Q. Right. And that is not the same area where these people—where Ardith and the other employees were entering data into the computer system?

A. No, but these are people that would carry them back there if they desired to go.

[38]

Q. The position—directing your attention specifically to March 30, 1981, how did you first become aware that Ardith McPherson—back up. One more question.

The area where they were, was it at that time permissible for the employees to listen to a radio?

A. I don't mind them listening to radios as long as it's reasonable.

Q. Okay. So there was a radio in that office, and that was with your knowledge and—

A. Yes, sir.

Q. —your permission?

Would it be fair to say that the job of typing the data into the computer system terminal is a fairly repetitious kind of job? You are typing a lot of—doing the same task over and over again, essentially?

A. Yes, sir.

Q. And you decided, as an employer, that it was reasonable to allow a little bit of distraction with the radio on?

A. Well, if it got too loud, then it would be turned off, but if it was on their lunch hour or something, or if it was reasonable, I wasn't going to be that hard to get along with.

Q. Okay. Directing your attention to March 30, '81,

how did you first become aware that Ardith McPherson had made some remark about President Reagan?

[39]

A. When Captain Pat Riley, who worked for me, who has now passed away, and Captain Levrier had walked out and went to Captain Riley, and brought him into my office and told me about it.

Q. Okay. Who came in to your office? Riley and Levrier, or just Riley?

A. Riley.

Q. Okay. And what did Riley tell you?

A. He told me that Captain Levrier was very upset because of a remark that Ms. McPherson had made, and he repeated it to me. I said, get Captain Levrier and bring him to my office.

Q. What did he tell you the remark was?

A. That Ms. McPherson had stated that today they shot the President, and hoped the next time they tried it, they would get him.

Q. Okay. And you understood that Mr. Riley—Pat Riley—had not heard that remark?

A. I knew that he hadn't.

Q. Okay. So from the very beginning, you understood that this remark was, at this point, third-hand, when it got to you; is that right?

A. He had stated to me that it was from Captain Levrier, and that's the reason I called Captain Levrier into my office, so that it would not be third-hand.

[40]

Q. Okay. What did Captain Levrier tell you?

A. He came in and told me just exactly what I had

stated to you, that she had made the remark, and he asked her if she meant it, and that she said yes, and so I—

Q. How did he characterize the remark? How did he describe it?

A. Exactly the way that I stated to you. That she hoped that the next time they tried it, that they would get him.

Q. Did either of you—did either of those gentlemen tell you anything else about the conversation during which this remark had taken place? Did they tell you, for example—

A. They told me of the remark that was made. I was very concerned that this remark was made, and that's when I sent for—

Q. Okay. We will get to that. But my question is, what did they tell you about the remark, or about the conversation, other than quoting that exact remark that you say both of them quoted the same way?

A. The very remark was that she had stated that the President had been shot, and that she hoped that the next time, that they would get him.

Q. Okay. Now—

The Court: And Captain Levrier told you he asked her—

The Witness: Yes, sir.

[41]

The Court: —if she meant it.

The Witness: If she meant it.

The Court: And she said—

The Witness: Yes, I do.

The Court: All right.

By Mr. Griffiths:

Q. Okay. Now, did they say anything about how that remark happened to be passed? Did they tell you whether or not she was standing on her chair, declaiming to the office, or did they tell you where she said it, to whom she said it, or any other details other than what you have already quoted?

A. Counsel, I did not go into that, because then it was my concern, it was my decision, and I wanted to talk to Ms. McPherson myself, and that is when I brought her in to my office.

Q. Okay. You brought her in to your office. And who was in your office when she came in?

A. Captain John Levrier and Jack Abercia.

Q. Okay. Now—and is—Abercia is also a captain?

A. No. He is my chief.

Q. Okay. And both of those men are deputy constables; is that correct?

A. Yes, sir.

Q. And where was Riley at this point?

A. He was out in the reception area, where his job is

carried on.

Q. And what conversation took place at the time that Ms. McPherson, Chief Abercia and Captain Levrier were in your office?

A. The question I asked Ms. McPherson is that, I have a report here of a remark that you have made, that it greatly concerns me, and did you say what—the thing. And she said yes. I said, do you mean it? She said, yes, I meant it.

Q. Back up. As best you can remember, what was the question you asked her, exactly, about the remark?

A. It was if she made the remark about hoping that the President, the next time he was shot, that they would get him. And I said, do you mean that. And no doubt in my mind, she said, yes. And that is when I took my action.

There was not any doubt in my mind, but I wanted to know myself, not what other people told me. And she cleared up my point for me.

Q. Your action—did you ever ask Ms. McPherson to whom she had made that remark?

A. I did not.

Q. Did you ever ask Captain Abercia—or Chief Abercia to whom she had made the remark?

A. I was not concrned who she had made it to, because she had made it to me, and when she made the remark to me, then

[43]

I lost all confidence at all that I could ever be comfortable in a law enforcement office and agency that I could permit her to be—

Q. Did you ever ask Mr. Levrier to whom she made the remark?

A. I did not go into it, what Mr. Levrier had told me.

Q. Did you ever ask—

A. I based my fact on what was made to me direct.

Q. Did you ever ask Lawrence Jackson to whom she had made the remark, before you determined to fire her?

A. I didn't discuss anything with Lawrence Jackson.

Q. Did you ask Lawrence Jackson about what the conversation was during which that remark had been made?

A. No.

Q. You wern't interested, right?

A. I was interested in the remark was made to me direct. After she satisfied my mind, face to face, that she meant what she said, then I did not go any further with it.

Q. Okay. And you also are aware that on the 31st of March, 1981, Ms. McPherson came by your office and requested an interview with you; is that correct?

A. Yes, and it was denied.

Q. So it wasn't inadvertent? You consciously refused to talk to her anymore about the subject?

A. I didn't have any other discussion that I needed to take

[44]

up with Ms. McPherson. It was my opinion that she was sincere what she was doing, and I didn't have anything else to discuss with her.

Q. And the fact—you, after this investigation in the matter—you called the Treasury Department, did you not?

A. I called the Secret Service and everything.

Q. And reported to them that you had a—

A. The remarks.

Q. —a person they ought to investigate; is that right?

A. Yes, sir.

Q. Did you ever ask Ms. McPherson whether she was working or on her lunch hour during this conversation?

A. No, I did not ask her.

Q. As far as you know, except for Captain Levrier's decision to report this matter to Mr. Riley, that conversation or that comment did not disrupt the work that was going on in that data processing area, did it?

A. I wasn't back there at the moment.

Q. Okay.

A. I was in my office.

Q. In fact, Constable Rankin—I'm handing you what has been marked as Plaintiff's Exhibit Number 5. And that is a transcript of the testimony of a woman named Heidi Cornelison Hinojosa; is that correct?

A. Yes, sir.

[45]

Q. And Ms. Hinojosa was in fact another clerk deputy who was working in that data processing area on March 30, 1981; is that correct?

A. That's correct, sir.

Q. And she was sitting in that same work area where Ms. McPherson made the comment about President Reagan; is that right?

A. I don't know. I wasn't back there.

Q. It's true, is it not, that you were here at the summary judgment hearing that was had in this case a while back?

A. Yes, sir.

Q. And this transcript is accurate, that when Ms. Hinojasa was asked, "so when the statement was originally made, it had no impact on your work; is that correct?"

She answered, "No, it did not."

A. I haven't read her transcript. I don't know what it is. If that's her testimony, it did not interrupt her.

Q. Okay. And you haven't heard any other evidence from any of your other employees that their work was interrupted by the original conversation in which the statement about President Reagan was made?

A. I did not base my action on whether the work was interrupted or not. I based my action on a statement that was made to me direct.

Q. You asked her in the direct statement whether she had

[46]

said, if they try again, I hope they get him; is that right?

A. Yes.

Q. And the answer was yes?

A. Yes.

Q. Okay. And it's your testimony that the next thing you asked her is, did you mean it. And she said yes.

A. Yes.

Q. Okay. And that is the statement for which you fired her?

A. Right then is when I lost confidence with her, and I told her that I didn't have a position in that office for her anymore.

Q. Okay. Constable Rankin, if you and I were having lunch together last Wednesday, let's say, and I said to you, I sure hope those 49'ers kill the Dolphins on Sunday, you would in fact understand that as not being a serious threat on the lives of the Miami Dolphin football team, would you not?

A. It's a lot different in playing football than it is the life of the President of the United States.

Q. Constable, you are going to get a chance to answer questions from your counsel. If you want to answer the questions I am asking, I would appreciate it.

A. Repeat it.

Q. If I said to you last Wednesday, I sure hope that those

[47]

49'ers kill the Dolphins on Sunday, you wouldn't interpret that as being a threat on the lives of the Miami Dolphins football team?

A. Not knowing you, I couldn't say whether you meant it or not.

Q. So you would have to consider the context of the conversation; correct?

A. If you were working for me, I would know a little more about you, counselor.

Q. And you would have to consider who I was and what my history was; is that right?

A. Well, I don't know. To really get into the thing, I don't know why I would be at lunch with you, because as I say, I don't know you. I wouldn't know you, so I would not know what you meant by it.

Q. Suppose Mr. Lee was at lunch with you, talking about the case, and he said to you, I hope the 49'ers kill the Miami Dolphins on Sunday. You wouldn't take that as being a threat that Mr. Lee would go out and kill the Miami football team, would you?

A. I have never heard Mr. Lee have a desire to kill anyone, or make any kind—so I couldn't say that would be in Mr. Lee's mind. If he did and he meant it, I would be very greatly disappointed in him, and I have a lot of respect for Mr. Lee.

[48]

Q. You would concede, would you not, that interpreting that statement, you would have to know more than just the words that were said in the statement? The football team comment? You would have to know more

than just what the English words spoken were, and in what order they were arranged?

A. Well, I'm a great big football fan, and I love it and everything, but I haven't been around anybody wanting a football team to be killed. I mean, it's just hard—this is far out.

Q. You never heard anyone use the verb kill in the context of a sporting event?

A. If I did, I don't recall it.

Q. The fact is, you never heard the conversation—the original conversation in which Ms. McPherson made the comment about President Reagan?

A. No, sir.

Q. And the fact is the only person that you ever talked to who heard that, was Captain Levrier; is that correct?

A. Until I had Ms. McPherson in my office.

Q. We are talking about the original statement.

A. No.

Q. Constable Rankin, you are a member of the White race, are you not?

A. Yes, sir.

Q. And Ms. McPherson is a member of the Black race; is that

[49]

true?

A. Yes, sir.

Q. And Constable—and Deputy Levrier is a member of the White race; is that correct?

A. Yes, sir.

Q. As is Deputy Riley and Captain Abercia; is that right?

A. Yes, sir.

Mr. Griffiths: Pass the witness, Your Honor.

The Court: Mr. Lee.

Mr. Lee: Your Honor, I have no questions at this time of this witness. He is an adverse witness.

The Court: All right. Thank you, Constable Rankin. You can step down, sir, and have a seat at counsel table.

Call your next witness.

Mr. Griffiths: Call John Abercia, Your Honor. I mean Levrier. I'm sorry.

The Court: Would you step out and call Captain Levrier.

Just come up and have a seat, sir.

John M. Levrier, plaintiff's witness, sworn

DIRECT EXAMINATION

By Mr. Griffiths:

Q. State your name, please, for the record.
A. John M. Levrier.
Q. Mr. Levrier, how are you employed?

* * *

(Portions of Testimony of Lawrence Jackson)

* * *

[148]

Q. Did Constable Rankin ever question you concerning the content of your conversation with Ardith McPherson?

A. To my knowledge, no.

Q. And did anyone else in the office ever ask you about what you and she had been talking about?

A. No.

Ms. Garcy: I'll pass the witness, Your Honor.

The Court: Okay. Mr. Lee.

Mr. Lee: I have no questions of Mr. Jackson, Your Honor.

The Court: Thank you, Mr. Jackson.

Ms. Garcy: Your Honor, plaintiff rests.

The Court: All right. What says the defendant?

Mr. Lee: Your Honor, I would like to call Constable Rankin on direct examination.

The Court: All right. Constable Rankin.

Walter H. Rankin, defendant's witness, previously sworn.

DIRECT EXAMINATION

By Mr. Lee:

Q. Constable Rankin, when we previously tried this case, a couple of years ago, you were at that time engaged

in what you term security work with visiting dignitaries. Is your office still engaged in security work?

A. When we are requested to assist, or called upon, yes.

[149]

Q. All right. Since February of 1983, has your office been in any security work involving President Reagan in Houston?

A. Since '83, I don't recall. We have furnished personnel for so many, and it's almost on a regular—if he was in here, I'm sure that we had personnel assigned.

Q. All right. Tell the court some of the people whom you have represented in just the past year, and furnishing personal security for them.

A. Well, within the last year, one of the main functions for a week was Billy Graham, when he was here, and we handled all security there. The last most important assignment that we have had recently was for Jesse Jackson, on two occasions.

Q. All right. Do you have any trouble at all in handling your assignments for Jesse Jackson?

A. Not at all.

Q. Have you been specially requested to handle those assignments?

A. We have, on both occasions.

Q. When you are handling a personal security assignment, would you tell the court what kind of information is made available to you, that is not available to the general public?

A. We know arrival, which airport, which plane he is coming in, we know how many people will be with them, what route

[150]

they will be taking, where they will be staying, and where they will be going and different places, because we furnish automobiles, and we furnish drivers and security to get them there and bring them back.

Q. All right. Does your office, in handling the security matters, divulge any of that to the news media or the general public?

A. No.

Q. Is that one of the terms under which you are selected as a security agency?

A. Well, for protection purposes, we fell like it's very confidential, classified information, and we do not give out the schedule. If it's going to be given out, it's going to be someone—by Mr. Jackson's staff, or someone there, but not by us.

Q. All right. Is there any danger in your office that any of your deputies will, with malice or just with negligence, make this confidential information available to other than your office staff?

A. I must have complete trust in the people I'm working there, because I—whoever might be typing, or the information there, or for my officers, is that I have to be comfortable with the people that I work with.

Q. All right. Do you make any particular effort to hide the security information made available to you on these

[151]

security details, from any suspect people in your—among your deputies?

A. Not any of the people that works there do we have anything to keep from them.

Q. Do you consider it within your oath of office, which

is prescribed by the Texas Constitution, that you will uphold the Constitution and Laws of the United States and of the State of Texas—do you consider anything in those laws to keep you from being the cheering section for anyone wanting to break those laws?

A. As a law enforcement officer, my oath of office is to protect the Constitution of this State and of this Nation. To protect it; protect the people involved.

Q. All right. Do your consider somebody wanting any person summarily killed without benefit of trial, without benefit of clergy, just by .45 caliber jurisdiction, to execute anybody, as being beyond your oath of office?

A. Yes, sir.

Q. Do you consider your oath of office binding on you?

A. Yes, sir.

Q. Do you consider it just as binding on anyone whom you have deputized to be Constable Rankin to the public?

A. Very much so.

Q. Do you have any reservations about giving any job assignment, no matter how sensitive, to any of your deputies?

[152]

A. I trust all of my employees.

Q. Do you consider that a necessity of the nature of your work?

A. Yes, sir.

Q. Is there any doubt in your mind—and especially since Ms. McPherson, from the stand there, has told you that she didn't mean anything by her verbal comments on wanting the President to be killed—is there any matter that you would reconsider in taking her back as your deputy?

A. I could not.

Q. Would you have any confidence in her if the court were to compel you to take her back?

A. Naturally I respect the courts very much. If it would see fit, then I would have to completely rearrange the function of my office. I would probably have to go to a very secretive office on the classified information. I would be very, very uncomfortable.

Q. To your knowledge, do you have any of your deputies who, in effect, ride with the cops and cheer for the robbers?

A. No, sir.

Q. Do you consider that inconsistent with their constitutional oath which they must take, also?

A. That's right.

Mr. Lee: Your Honor, I have no further questions of Constable Rankin.

[153]

The Court: All right.

CROSS-EXAMINATION

By Mr. Griffiths:

Q. Constable Rankin, it's your testimony, then, that essentially you consider the entire area of your office to be a high security area which sensitive information that might be useful to a would-be presidential assassin can be freely circulated because all your people are trustworthy; is that right?

A. If I don't trust them, I would get rid of them.

Q. Okay. So you basically say that it's intolerable—that if you are a deputy of Constable Rankin's office, you

are privy to any secrets of that office, and there is no organization or classification of whom can be privy to secret information?

A. Well, the secret information, counselor, on the President of the United States—not for one moment do you think that the Secret Service is going to give me every move that's made. He is going to give—they are going to give me the information on what part we are going to handle, and the information my officers—on what we are doing. But as far as the very vital deal that, some things, certainly we are not going to have that. We understand that.

Q. And you can't imagine setting up a system where —or you haven't set up a system, let's say, whereby information

[154]

of this sensitive type could be available only to the people who need to know it?

A. My personnel knows it, but as far as putting it out on the bulletin board out in the hall where other people can see it, no.

Q. Well, we are talking about—what? Eighty? How many employees in your office?

A. At that time, it was.

Q. Right. Okay. Now, are you saying that they are all equal in their right to know the information that the Secret Service has provided you about President Reagan or Jesse Jackson, or Walter Mondale, or whomever you are guarding?

A. All of my personnel takes great pride that my office and our people have been chosen to take a part, and—for instance, they take a lot of pride in the confidence that people—

Q. Would you answer my question. Are all of them equally—

The Court: Counsel, let's not shout. The question was are they all equally—do they all have equal access to this information.

The Witness: As far as schedule of where we will be, yes, sir.

By Mr. Griffiths:

Q. Constable Rankin. I'm handing you what has been marked

[155]

as Plaintiff's Exhibit Number 1, which cover sheet identifies as the personnel file of Ardith McPherson. Would you look at that, please.

A. Okay.

Q. Look at every page.

A. (Witness complies.)

Q. Okay. Now, Mr. Lee has not objected to the admission of this as the personnel file of Ardith McPherson. Do you see anything wrong with that, in terms of it being a true copy of the personnel file of Ardith McPherson?

A. I didn't read every page on it, but if counsel accepted it, I'm not going to quarrel with it.

Q. Okay. Let's go through page by page. After the cover sheet, this page is essentially a calendar that shows when you were late to work; right?

A. Uh-huh.

Q. Okay. And this is another calendar that shows when you were absent for a doctor's appointment, or when you were absent in general; is that right?

A. Uh-huh.

Q. Okay. This is just a piece of paper that has some days and times for time where she made up time that she missed; is that right?

A. I presume it did. I wouldn't keep a record of it.

Q. That's what it appears to be?

[156]

A. Right.

Q. This is a card—I don't know what you would call it. It has your name, address, work number, position, next of kin.

A. This card is a card I designed when I took office, of every person connected with my office, from myself on, from every deputy, every chief, every clerk, every reserve officer, anyone represented there is all information on them, with a photo, that the FBI, Secret Service, District Attorney's Office, on any complaint on any of my personnel, we can lay it out, or if we get a complaint on misconduct, we can lay all our personnel so people can evaluate and choose whoever might be.

Q. Okay. But this card—in essence, the information that it has, besides your name, telephone number, address and next of kin, and a driver's license number, is limited to a photograph; is that right? There is no fingerprint or anything like that on it, is there?

A. No.

Q. Okay. There appears to be a message—telephone message note, telling you that Mrs. Rankin had called you; is that correct?

A. Uh-huh.

Q. Dated 4-3.

A. Yes.

[157]

Q. Okay. And this is a note—a telephone note telling you that some interested citizen had called and congratulated you for firing Mrs. Rankin; is that right?

A. Firing Mrs. Rankin?

Q. I believe—

A. I hadn't fired her yet.

Q. It says 4-3-81 is the date. It says, called to congratulate you on the stand that you took regarding the statement made about our President. Doesn't that sound like congratulations?

A. Yes, but that wasn't the way you—I know what you mean, so I guess I was just saying that, but—

Q. Okay.

Another phone message. This is—

A. But, counselor, as you might state, this information, although it was to me, and you have it, even most of these phone calls that I have is not hid from employees, good or bad, see.

Q. Fine. Fine. I'm just—we are just going through and seeing that this is in here. Okay.

This is the notice from the County Auditor, addressed to Ardith McPherson, telling her that her major medical deductible had been increased; is that right?

A. I see the auditor's name there.

Q. Okay. This is another insurance paper.

[158]

A. Uh-huh.

Q. This is the change of status. Essentially the form that you filed, showing that she had been fired; is that right?

A. I believe. Yes.

Q. Okay. This is a form you filed with the county records when she was fired; right?

A. Yes, sir.

Q. Okay. Now, it doesn't have any information about her except her name, social security number and the effective date, the salary, that sort of thing.

A. Yes, sir.

Q. Okay. This is her Form W-4 that she filed to authorize your office, or the county auditors, to withhold taxes from her pay; is that correct?

A. Yes, sir.

Q. Okay. This is an application for employment. Okay. This application for employment is on one legal size page. It includes her name, social security number, address, telephone, next of kin, who she is replacing, how many hours a week she works. That's essentially it. And that was—it's styled application for and contract of employment; is that right?

A. Yes.

Q. Okay. This appears to be a physical form. That must have been a pre-employment physical; is that correct?

[159]

A. I don't recall that. May have.

Q. Doesn't—it seems like one thing is checked. Okay. Here is something else from a doctor. Okay. Texas county and district retirement system personnel data. This is what she had to turn in to enroll with the county employees' retirement plan, is that right?

A. Yes.

Q. Okay. This is a certificate—a card that shows that she is a deputy; is that correct? And that's about all it shows.

A. Well, that's not from me. That comes after they have certified her, and for the court or auditor—the county commissioners has to certify her employment.

Q. Okay. So that comes from Anita Rodeheaver instead of from you?

A. Comes out of the clerk of the court. Yes, sir.

Q. Okay. This is a card to sign up for medical insurance?

A. Yes, sir.

Q. This is a—I guess what you call the real application. It's one legal size page. It shows name, address, next of kin, that her current hobbies are sewing and dancing, that she is an American citizen, and that she graduated from high school, has one year of college, shows the names of high school and the college. It says she has no relatives in county employment, she has never worked for the county—

[160]

Harris County before, that she has operated a typewriter, switchboard, files, and gives Lawrence Jackson and Wilma Bomen as references. It says the position desired is clerk typist, and salary expected, $700 a month.

Do you agree with me that's substantially all the information on there?

A. Yes.

Q. Okay. And this is a typed piece of work which starts out, no one likes to look for a job. The person who is job hunting is naturally on the defensive.

And would you agree with me that that was probably a typing test?

A. I would guess so. I don't recall it.

Q. It has corrections circled on where something is typed.

A. I don't know if this was the test they gave her or not.

Q. All right. We have gone through every page of that; is that correct?

A. Yes, sir.

Q. Constable Rankin, are you seriously telling this Court that you expect every member of your staff to be entrusted with secret information about the travels of the President of the United States and similar dignitaries, and that the only investigation you made before you hired Ardith McPherson was to give her a typing test?

A. I'm not going to get on a mountain top and shout it out.

[161]

It is there, and if I call upon Ms. McPherson to type up a work schedule for me, I want to be comfortable with her.

But still, you must realize that the main function of security for the President of the United States rests with Secret Service.

Q. I understand that, sir.

A. And we know what our duties will be.

Q. Okay. And then the—you have access, as a law enforcement officer, to the TCIC system, do you not?

A. Yes, sir.

Q. And the TCIC system is a computerized system that shows criminal arrest histories of individuals who have been arrested in Texas; is that correct?

A. Yes, sir.

Q. You didn't attach that to her personnel file before you hired her, did you?

A. I'm not even sure I had it at that particular date.

Q. Okay. Do you know what in NCIC is, sir?

A. Yes, sir.

Q. The same thing, except the FBI in Washington runs it; is that correct, sir?

A. Yes, sir.

Q. You didn't attach NCIC to that?

A. No, sir.

Q. Despite the fact that Ardith McPherson told you that she

[162]

had recently moved to Texas from Bronx, New York.

A. I wasn't upset about where she had moved from.

Q. Okay. You also told me before that your office was open to all the people of Harris County who needed help.

A. That's right.

Q. And when I tried to get you to say that people didn't come back into Ardith McPherson's work place very often, you objected and said, well, if they need help back there, they were free to come back there. Isn't that correct?

A. We had no restricted area.

Q. So nonetheless, you are saying that all 80 employees are privy to secret information about the President of the United States' movements while he is in Houston, yet we let every member of the public who cares to, wander in and hang around, access to that area where all those employees are working?

A. It is not posted.

Q. Well, it could be sitting on a desk if somebody is typing it in the area she is working.

A. It would not be there. If it was typed up, it would be brought back into my office.

Q. So you are saying in fact you are careful with that information, not to widely distribute it; is that right?

A. We are not going to post it, counselor. After it's typed up, it's brought back into my care and control.

[163]

Q. Is your basic position that Ardith McPherson shouldn't have to work for you because you are not comfortable with what she said?

A. My basic is that she could not work for me because I am not comfortable, period. I have lost all confidence in her. I gave her an opportunity. She convinced me of what she said. And so, no, I would not be comfortable with her.

Mr. Griffiths: Pass the witness, Your Honor.

Mr. Lee: No questions, Your Honor.

The Court: Thank you, Constable Rankin. You can step down.

Mr. Lee: Defense rests, Your Honor.

The Court: All right. Be glad to hear from you, counsel.

Mr. Griffiths: We have nothing on rebuttal, Your Honor. We do have an argument.

The Court: All right, sir.

Mr. Griffiths: Your Honor, I think that this issue, this question, is very clear. I think the evidence is essentially all on one side. The *Connick v. Myers* decision emphasizes that when we are talking about the First Amendment rights of a public employee, we are balancing the interest of the public office in operating and doing its job, versus the interest of the employee in question, in having a right to free speech.

[164]

The *Connick* case essentially was decided on the issue of whether or not Ms. Connick's comment or questionnaire that she circulated among the members of that office staff were primarily concerned with questions of public concern, or whether they were primarily internal office problems which—the raising of which essentially amounted to insubordination.

I think in this case, the facts are very clear that the conversation which took place had nothing to do with the operation of that office or with Ms. McPherson's duties within that office. In fact, the evidence is crystal clear it would have had no impact on the operation of that office, if Captain Levrier had not taken it upon himself to make an issue of the statement. Essentially, it was a conversation about President Reagan. It was a conversation about his policies. It was a private conversation between two people who were very close, and was not intended for general distribution.

The evidence that the fellow workers didn't even pay any attention to it, didn't even know the comment had been made until Ms. McPherson had been fired, demonstrates to me very clearly that the *Connick* test is not being met by the evidence in this case. That is, a test for dismissal, simply because there isn't any interference with the operation of the constable's office.

[165]

The dichotomy between public concern and internal affairs weighs down completely on the side of public concern. The question of how this statement is to be understood, I think is important, and virtually crucial.

The only way that this statement could be understood as interfering with the operation of this office, of the constable's office—would be essentially if it were to be understood as saying that I, Ardith McPherson, intend to actively work for the assassination of President Reagan. It certainly is not that on its face. It, I don't think, can reasonably be interpreted as being such a statement by anybody.

I think it was clearly a statement made under exciting circumstances. It was something that essentially amounted to, I don't like Ronald Reagan and Ronald Reagan has been thrust to my attention by this radio report.

The fact that it could not interfere with the operation of this office is shown quite clearly by Constable Rankin's testimony. It's absolutely clear Ardith McPherson, without some 400 hours of training, could not—and considerable screening—could not have been assigned to guard any visiting dignitary. As Constable Rankin said several times, the job of guarding the President is that of the Secret Service of the United States.

[166]

Constable Rankin's role here in Harris County is essentially the service of civil papers, and several other similar types of duties. The job of guarding dignitaries is a sideline; one that he takes great pride in, but is not the major job of his office. And it's clear that under virtually no imaginable circumstances would Ardith McPherson have any great role in guarding the life of the President of the United States. And I believe that that fact is demonstrated very clearly by Exhibit 1, which shows that if Constable Rankin took this seriously—and certainly we have to believe that he is sincere about wanting to protect the

people that he is guarding—I certainly believe he is—if he took that seriously, he certainly would not have hired anybody for the kind of high security role that he now wants to put on Ardith McPherson, without somewhat more of a background check. Even just the simple act of running a computer check in channels available to law enforcement agencies wasn't even performed.

You don't hire people to handle high tech—high security about the President of the United States, and pay them minimum wage, Your Honor. The notion that Ardith McPherson would ever have anything to do with protecting the President of the United States is nothing but a red herring. The real fact is she was hired to type data into the computer. She typed data into the computer

[167]

satisfactorily. There is no evidence that suggests otherwise. And there is no evidence that suggests that this statement disrupted the course of the job that she was hired to do, or interfered with anybody else in the constable's office doing his or her job.

We talked about the question of intention, and we called Professor Kochman, who testified about some of the issues which arise when you try to figure out what other people mean.

I think in this case that the issue of intention is an important one to look at, and to analyze very closely. The court suggested in its colloquy with the witness, that if Chicago Publisher McCormick—Colonel McCormick had had a columnist who wrote as the lady referred to did, that she felt like machine-gunning the bus load of people, that she wouldn't have worked for the Tribune

much longer, and that may very well be true, but it is important to note that Colonel McCormick was not bound by the First Amendment.

It's clear, as Constable Rankin states—admits—that he cannot—should not—fire people for their political opinions. He could not and cannot fire them simply because they have some view about the world which is different from Constable Rankin's view. And that is what this case essentially comes down to.

[168]

The court also suggested in its colloquy that the issue of self-defense—should we apply different standards to Black people and White people, to whether or not someone reasonably acted in self-defense. And the court cited the recent newsworthy situation involving Mr. Goetz in the subway in New York.

An important distinction there is the law of self-defense is perfectly clear, Your Honor, that the relevant state of mind is that of the person acting in self-defense. The recipient of the communication. And that is clear-cut. That is not the law in this case. The law in this case, I would submit, is laid down in *McPherson v. Rankin,* where it says, in determining whether private speech by a public employee is entitled to First Amendment protection, it is important to consider the context in which it is made, relevant considerations, including the manner, time and place in which it is delivered, and the intent of the speaker.

Not the understanding of the hearer, but the intent of the speaker. I think it's important to notice in determining the—and certainly we can only determine intent by

objective evidence, and to some degree circumstantial evidence; we don't know what the speaker is thinking at the moment she speaks. But we do have one very important piece of objective evidence, which is the

[169]

only person who heard the conversation with Lawrence Jackson. He had worked in that office for some time at that point. He was a commissioned Texas peace officer at that time. He was the lover of Ardith McPherson.

He heard that conversation. And he didn't say, hush, Tiki. Be quiet. They are going to hear you. You are going to get fired. He knew what was appropriate. He took it as being just what it was intended to be, which was a conversation or a comment on a piece of news—rather unusual news—that had come over the radio while they were listening to the conversation. And I think that is the most—the best piece of objective evidence as to what the import of that conversation was.

Captain LeVrier says he doesn't remember anything except she said, I hope they get him next time. That's credible evidence because Captain LeVrier was basically not listening to that conversation. He was listening to the radio. And if you believe the testimony of Mr. Jackson, he was listening—he was discussing this with some of the other workers in the area.

Lawrence Jackson, who heard the conversation, didn't see it as being something that threatened his girlfriend. Didn't see it as being something she ought to be quiet about and hush up. Even when LeVrier came over and asked her about it, he still basically—one has to

[170]

assume because the whole conversation seemed so trivial to him basically—was not, you know, did not get defensive, or jump and say, you can't do that, or start saying things on her behalf. He just basically took it as being a rather unimportant thing that happened, indicating that his perception of the conversation was that it was not a serious threat, or even a very serious comment on what they had just heard.

So the question is intent. And if we listen to Professor Kochman, he tells us that the fact that the two people having the conversation are Black, may not make a big difference, but it makes some difference, and one of the things is that Black culture tolerates a greater degree of sort of verbal flamboyance. They don't see talking, as such, as entitling somebody to retaliate. And I think that that is one more factor that needs to be considered in deciding what the intent was of Ardith McPherson.

I think it's also important to note that the original decision-maker, Mr. Rankin, made no determination to determine what the intent of Ardith McPherson was, except by his own testimony was a very hurried conversation where he said, did you mean it, and she said, yes.

Now, I respectfully submit that "did you mean it?" is not considering the manner, time and place, and the context, and all the things that the court tells us we have

[171]

to consider. It is not a serious attempt to determine what her intent was.

I think this proceeding certainly is a serious attempt to consider what her intent was, and I think the evidence

shows very clearly that her intent was not such that it presented any serious threat to the President of the United States. To corroborate that, we look at the reaction of the Secret Service, which came out and interviewed her, at the request of Constable Rankin, and apparently never made any more moves to contact her, indict her, prosecute her, keep an eye on her when President Reagan was subsequently in town, or anything else that showed that they regarded her as a serious threat. I have to say the Secret Service Agent, based on Ms. McPherson's testimony, made a more serious attempt to determine what her intent was than did Constable Rankin.

Finally, Your Honor, I would like to talk briefly about the First Amendment, in general, because after all, that is what we are litigating in this case. One of the reasons for having the First Amendment is that we have a democracy, and we need a free marketplace of ideas to assure that democracy makes a wise choice, and that is why politically—

The Court: How would you respond to a comment, let's kill all the ACLU lawyers, as free speech, counsel?

[172]

Mr. Griffiths: Your Honor, I would—in fact, I have received such comments in the mail regularly, and I respond to it as being free speech, Your Honor.

The Court: Okay. A man of principles.

Mr. Griffiths: The First Amendment is involved with great ideas, political discourse, and I would submit that this is political discourse on a very down-to-earth level. The First Amendment is also involved, I would submit,

with personal freedom. Not political freedom, but personal freedom. And what I mean by that—

The Court: Wasn't Ms. Myers just engaging in personal political discourse? And she got fired over that question.

Mr. Griffiths: She got fired because she was systematically disrupting the functioning of her employer's office. And I submit that the evidence shows that there was no disruption in this office as a result of anything Ms. McPherson said. I think that's a critical difference.

The Court: You really think that's all?

Mr. Griffiths: I think that Ms. McPherson's comment was to a public issue. It also was a very private conversation. And I think the First Amendment—one of the reasons for it is to protect us from having secret agents looking over our shoulders all the time and bringing us to account for essentially idle comments that may pass our lips

[173]

from day to day.

I think that part of the notion of having regulation of wire taps, the notion of the Fourth Amendment in terms of the privacy of our homes, is strictly to make this so it remains not a police state where we have to worry about every word that we say. And I would submit to the court that this particular conversation is a great example of that right; a conversation that is deserving of that protection. Thank you.

The Court: Go ahead, Mr. Lee.

Mr. Lee: Thank you, Your Honor.

The Court: I hope you are not going to stress too much her position as a quasi-secret service agent.

Mr. Lee: I will do my best to eliminate that from my prepared speech, Your Honor.

The Court: All right.

Mr. Lee: The Secret Service Agent who did come out and interview Ms. McPherson, though, was not looking at her as his deputy, or as his fellow worker, but he was looking at her as an object of suspicion, and his suspicion that she, herself, posed no threat to the President was quickly satisfied.

Now, that is not the same context in which Constable Rankin was looking at her when he, himself, face to face with her, asked her if she had said that she

[174]

would like to see the President killed, and her statement to him that she would.

Now, this is his alter ego. Now, she just may be punching in the computer information there, but if that is one of the duties of his office, and if he does not have a deputy doing that duty, then he, himself, has to do that duty. He does have a deputy to do that, a deputy whom he thinks is going to be Constable Rankin in the eyes of the public there.

He is sworn to a constitutional oath. His deputies are sworn to the same constitutional oath. And in the eyes of the public, his deputy is him. He has more than 100 deputies in the eyes of the public. When they see any one of them, that is Constable Rankin, to them.

His duties are so big that he, himself, cannot possibly do all of his work without the help of deputies in whom he has confidence, because he is given statutory obligation and liability for everything that his deputies do to the public and for the public, so he must have confidence in them, because they have the power to make him famous, to keep him employed, and they also have the same power to ruin him.

Now, he, of course, has a very personal outlook at it. And when he brought Ms. McPherson in to tell him exactly what she said, and she said exactly as she has

[175]

pleaded in her complaint before this Court here, as to what she said, and he then asked her for reassurance as to what she meant, and he says that she gave him the assurance that she did mean it.

Now, we have Captain Levrier, when he first heard it, and he asked her, and he said that she said that she meant it. He said, you don't mean that, and he says she said, she did. She says she just looked at him and smiled. Now, that is not normal procedure, to deal with a superior officer of the rank of a ten-week beginner who hasn't even gotten tenure yet, and a captain of the hierarchy with more years in service as a law enforcement officer than she had years on this earth here at that time.

The officers—Captain Levrier and Chief Deputy Abercia—now, Abercia is very busy running the office of the Constable while the Constable takes care of public relations work, in part—he does a lot of his own work, but during an interruption there, he did not hear Ms. McPherson state that she did mean it. But from the gist of

the conversation that he heard while his attention was distracted, he also is of the viewpoint that she did.

Now, this is fine and good for someone out in the streets. In the Constable's deposition that was taken by Ms. McPherson—in the deposition, he was asked what would a librarian do if she heard an assistant

[176]

librarian say this. Well—

Mr. Griffiths: Objection. This is outside the record.

The Court: Just argument, counsel.

Mr. Lee: Librarians we don't have before us. We have a Constable and one of his deputies. They are sworn to a different oath. We don't have any idea what kind of an oath a librarian swears to. A citizen on the street doesn't have to swear to uphold the Constitution and laws. All he has to do is avoid being caught whenever he breaks any of them. This is a different mission from a law enforcement officer who is a very special person in our type of society here. The standard for them is much greater, because the power that they exercise is much greater.

We are liable and responsible for what we say. And there are not different meanings given to different words by different people. We have here an exact statement shown in her Complaint, in her own words, and the Constable reacting to those words there.

Now, the Constable must have confidence in all of his deputies. We are not ordinary citizens. We are law enforcement officers. We are held to a higher standard because we are insisting that the citizenry themselves hold them-

selves to a higher standard than they would were we not out there to compel them to do so.

[177]

Now, it is not a proper law enforcement obligation to espouse that we will determine the President of the United States by bullets rather than ballots. We have, unfortunately, too much history in this nation of bullets deciding what ballots have determined not to someone's liking there.

The law enforcement officer is to uphold the law through the ballot, and to advocate a violation of laws—and it's a violation of the laws of Texas to kill someone, and all men are created equal, so the President is just as much an object of the law as John Doe down on lower Congress Avenue here. It is illegal, no matter who we kill. And for a law enforcement officer to advocate killing, it is a different cut of cloth than to have the reporter for the Chicago Tribune to advocate the machine-gunning of all the whites there.

It is possibly consistent with her caliber in the Chicago Tribune matter there, to espouse that, although the doctor said that she did not really say exactly what she was quoted as saying. But, again, that is playing with words there. That was the gist of her feelings there. But she wasn't a law enforcement officer. She wasn't sworn to uphold the law, and then espousing the breaking of the law.

It was disruptive to the Constable's office to

[178]

have someone who is not marching in step to our drummer, here in our midst as one of us. If we were

talking about the Dolphins and the 49'ers, this would be just like a guard on the Dolphins coming back to the huddle there and telling the quarterback, Marino, that I hope that linebacker for the 49'ers smears you on the next play.

This is inconsistent with our team pattern here, and it is not a variation that we can live with, and it is not a variation that the Constitution expects a law enforcement officer to live with. Thank you.

The Court: All right.

Last word, Mr. Griffiths.

Mr. Griffiths: Very briefly, Your Honor. If this case hinges on Ardith McPherson being a law enforcement officer, I would suggest to the Court that the evidence was essentially uncontroverted that she was not such an officer. She was not trained, she was not commissioned, she was not authorized under the laws of the State of Texas to perform any service as a law enforcement officer. She was paid minimum wage to type documents—data off civil papers into the computer. That is her job. That is the undisputed evidence, that that was her job. And if she—if this argument—which apparently does rest on her being a law enforcement officer—then it must fail.

The Court: This is not any easier the second time

[179]

around than it was the first. I have the greatest respect for the plaintiff's position on free speech. I have an equal respect for the responsibility of a constable to maintain a proper office environment. I suppose while listening to the testimony this second time and re-reading the Fifth

Circuit's opinion and re-reading *Connick v. Myers,* I think I understand what the courts are trying to tell us.

There is no question but that Constable Rankin, in his decision, was bound by the First Amendment, through Section 1983. There is no question that Ms. McPherson was a probationary public employee; no question but that she was discharged. I really don't believe there is any question about what she said. In the context of the President's near assassination, she said words to the effect, "if they go for him again, I hope they get him."

The real dispute in the testimony was whether she affirmed those words to the captain who first approached her at her terminal, and once again to Constable Rankin. I believe that by words or deeds, she conceded having said those words to them, and made no attempt to retract them.

But I'm not sure that the real question in this case is what she meant. I think the language we are taking is from the case of *Bickel v. Burkhart,* and that is the language that is important in determining whether private speech by a public employee is entitled to First

[180]

Amendment protection. To consider the context in which it is made relevant considerations, including the manner time and place, and of course later on, the Fifth Circuit says intent relates to context, so I guess the ideas of intent, manner, time and place all tie in to a definition of this equally ambiguous term, context.

The remarks that Ms. McPherson made were made to another employee, Mr. Jackson, in the hearing of a superior officer. I suppose that by the definitions I have

seen, that is certainly private speech. I suppose that is what the Supreme Court and the Fifth Circuit means by private speech, as opposed to going to the public with these things. I'm not sure what the questionnaire in *Myers* was. I guess it was private speech, as well. The questionnaire was rather broadly distributed, but it did concern only internal office matters.

Now, let's put what Ms. McPherson said, in context, as the cases tell us to do. The statement was made so that it sounded like a comment to a radio news report on the attempted assassination of the President. I had the erroneous impression at the original hearing, and carried it to the Fifth Circuit, that this was during her lunch hour, and it apparently was not. It was during the lunch hour, but she was actually on duty, as she just testified a few minutes ago. It was made in the office of the constable,

[181]

while she was on duty.

What is the intention of the speaker. I hope that the plaintiff is not suggesting that the intention of one race must be decided by different standards than the intention of another race. That, I find a very disturbing and disquieting theory. If we are to carry Dr. Kochman's philosophy into the law, then the constable ought to treat people differently because of their race, and that is clearly against the law.

I think that the constable was entitled to listen to the words that were said by Ms. McPherson, when she repeated them to him, were confirmed that she had said them to him, and judge those words by their ordinary English context. The constable never accused Ms. Mc-

Pherson of threatening to go shoot the President again, as Mr. Hinckley had just done. Although he did report this episode to the Secret Service, he did not fear her because she threatened to do harm to the President.

Then I suppose we get down to the serious question, what did she "mean." I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where

[182]

one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

It's not like the *Myers* case where Ms. Myers was trying to comment upon the internal affairs of the office, or matters upon public concern. I don't think it is a matter of public concern to approve even more to the second attempt at assassination.

I believe Constable Rankin is very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be. He does do a great deal of work with the public. If the people he hires mistreat the public, disappoint the public, insult the public, Constable Rankin is not going to get re-elected, and he is not going to be following his sworn oath.

Certainly he had some concern about the security questions that Ms. McPherson would have access to; delicate information about the whereabouts of the President. I think that is far less significant in his motivation

than the question of the statement by Ms. McPherson, indicating to him she was the kind of person who would be a bad employee, would be a negative influence in the office.

I think what we have at this point is the *Pickering v. Board of Education* balance test. Who has more right? Ms. McPherson, to say, if they go for him again, I

[183]

hope they get him, or Constable Rankin's right to promote the efficiency of the public service, through his employees.

In looking at the balancing test, I have got to go with Constable Rankin, as I did on the initial hearing. I think applying the *Mt. Healthy City School District Board of Education v. Doyle* test, number one, is the communication protected, no, I do not believe it is. I do not believe that that is protected speech. But applying the second part of the test, it certainly was a substantial part in the decision to fire her, and I doubt that he would have fired her had she not made that comment. I know I'm not required to reach the second two points, having found against the plaintiff on the first.

In the context of those remarks, I do not believe that they were protected speech, and I believe that forecloses her under *Mt. Healthy* and *Garza v. Rodriguez*. All of these cases, of course, are cited by the Fifth Circuit.

I would have to do what I did before, after hearing the evidence before, and that is hold for the defendant.

Anything further, counsel?

Mr. Lee: Nothing further.

Mr. Griffiths: Nothing further.

Mr. Lee: Thank you, Your Honor.

[184]

The Court: Thank you very much for presenting this matter in a straightforward and efficient manner.

Mr. Griffiths: Your Honor, is the court—is that opinion from the bench the court's opinion?

The Court: Those will be my Findings of Fact and Conclusions of Law.

Mr. Griffiths: Thank you, Your Honor.

(Proceedings concluded.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-81-1442

ARDITH McPHERSON,
Plaintiff

v.

WALTER RANKIN, et al.,
Defendants.

(Filed February 4, 1985)

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58 and based on the findings of fact and conclusions of law entered on the record in this cause, judgment is hereby entered for Defendants. Plaintiff's claims for relief are in all ways denied. Each party in this action shall bear its own costs.

This is a FINAL JUDGMENT.

Done at Houston, Texas, this 4th day of February, 1985.

/s/ NORMAN W. BLACK
Norman W. Black
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-2129

OPINION

ARDITH McPHERSON
Plaintiff-Appellant,

v.

WALTER RANKIN, Individually and in his Official Capacity as Constable, Precinct One of Harris County, Texas, and HARRIS COUNTY, TEXAS,
Defendants-Appellees.

(Filed March 19, 1986)

Before: Jerre S. Williams, Patrick E. Higginbotham, and W. Eugene Davis, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham

Appeal from the United States District Court
for the Southern District of Texas

Norman W. Black, District Judge, Presiding

SUMMARY

Civil Service/Constitutional Law

Appeal from district court decision upholding the dismissal of a public employee after finding that a remark she had made was not protected speech. Reversed and remanded.

Ardith McPherson was a clerical worker in a Houston, Texas constable's office. After hearing a radio report of the attempted assassination of President Reagan on March 30, 1981, McPherson said to a co-worker: "[I]f they go for him again, I hope they get him." The statement was made to the co-worker at the end of a discussion about the President's policies. A deputy constable overheard the statement and reported it to Constable Rankin, who immediately questioned McPherson about it. When McPherson acknowledged both that she made the statement and that she meant it, Rankin fired her. McPherson filed suit against both Rankin and the county. The district court held that the remark was more than mere political hyperbole, that it was not protected speech, and that Rankin could fire her for it. On appeal, McPherson argues that the district court erred in not recognizing the political nature of her speech and in concluding that it was not within the protective ambit of the first amendment.

[1] Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression. If it is established that the speech in question is addressed to "matters of public concern," the first amendment interest in protecting the employee's freedom of speech must be balanced against the government's interest in maintaining discipline and efficiency in the workplace. [2] The record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. Although she has denied that this was her view and she is supported by the only person who heard the remark in context, her statement to Rankin that she "meant" what she said pro-

vides the requisite support for the district court's "factual" finding. [3] Regardless of her intent, however, her comment clearly addressed a matter of public concern, be it a hyperbolic expression of unhappiness with the President's policies or an actual wish for his assassination. Therefore, the value of protecting her right to express her opinion, however loathsome, must be weighed against competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

[4] Here, the government's interest does not outweigh the first amendment interest in protecting McPherson's speech. Her comment was made to a co-worker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office. [5] Although a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency, [6] because of the utterly ministerial nature of her duties, McPherson's potential for undermining the office's mission was trivial. She was one of a dozen clerk-typists, she was not a law enforcement officer, her job did not bring her into contact with the public, and she had no access to sensitive or important files. Under these distinct circumstances, McPherson could not be constitutionally fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

On March 30, 1981, President Reagan was shot. After hearing a radio report of the attempted assassination, Ardith McPherson, a clerical worker in a Houston, Texas constable's office, said to a co-worker: "[I]f they go for him again, I hope they get him." A deputy constable overheard the statement and reported it to Constable Rankin, who immediately summoned McPherson to his office to question her about the remark. When McPherson acknowledged both that she had made the statement and that she meant it, Rankin fired her.

McPherson sued Rankin and Harris County under 42 U.S.C. § 1983. After the district court granted defendants' motion for summary judgment, a panel of this court remanded for a trial on the merits. Noting McPherson's contention that "her statement was merely a form of political hyperbole and was not intended to advocate harm to the President," *McPherson v. Rankin,* 736 F.2d 175, 178 (5th Cir. 1984), the panel observed that "[t]he issue of McPherson's intent is relevant to the present inquiry because it is imperative that a court's characterization of speech as political expression, for purposes of First Amendment protection, be predicated upon consideration of its 'content, form, and context.'" *id.* at 178-79 (citation and footnote omitted).

After the ordered trial, the district judge ruled from the bench, explaining:

> I'm not sure that the real question in this case is what she meant. . . . I suppose . . . that [this] is certainly private speech . . . I don't believe she

> meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public government official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

The court also found that Rankin had a need for employees who will not "mistreat the public, disappoint the public, [or] insult the public," and concluded by purporting to balance McPherson's speech-related interests against the interests of the constable's office in law enforcement. In holding that McPherson's remark was not protected speech, the court seems to have concluded both that McPherson actually hoped that the President would be killed and that Rankin could fire her for that view. In Constable Rankin's colorful words, he ought not be required to employ a person who "rides with the cops and cheers for the robbers."

II

McPherson argues that the district court erred as a matter of law in not recognizing the political character of her speech and in concluding that it was not within the protective ambit of the first amendment. She also urges that the interests of her employer do not outweigh her rights of free speech. Defendants reply that McPherson espoused "a violation of the criminal law of murder . . . completely inconsistent with the oath to uphold the laws to which both the Constable and the Deputy have been sworn [and that it] is not only the

right of the Constable but also his duty to terminate a Deputy's appointment when that Deputy apparently desires to see the criminal laws violated."

III

-1-

Hornbook law informs us that the first amendment, as applied to the states, *Wallace v. Jaffree,* 105 S. Ct. 2479, 2486 (1985), protects a very wide range of speech from suppression by the government. *See, e.g., Brandenburg v. Ohio,* 395 U.S. 444 (1969). Although not all spoken words are covered by the first amendment, *Konigsberg v. State Bar,* 366 U.S. 36, 49 n. 10 (1961), constitutional protection extends to expression concerned with private matters, *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975), as well as to speech that takes place in private. *Givhan v. Western Line Consol. School Dist.,* 439 U.S. 410, 415-16 (1979). A state would therefore face considerable constitutional obstacles if it sought to criminalize the words that were uttered by McPherson on the day the President was shot.

[1] The government has not sought to prosecute McPherson as a criminal, but to terminate her from a public job, which presents a very different set of legal questions. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Connick v. Myers,* 103 S. Ct. 1684 (1983). Only when a government employee engages in expression addressed to "matters of public concern" does the first amendment protect him from termination for such expression: "ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the

reasons for the dismissal are alleged to be mistaken or unreasonable." *Connick,* 103 S. Ct. at 1690 (citations omitted). This rule is based on "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 1688 (footnote omitted). If it is established that the speech in question is addressed to "matters of public concern," we are required to balance the first amendment interest in protecting the employee's freedom of expression against the government's interest in maintaining discipline and efficiency in the workplace. *Id.* at 1686. In striking this balance, we must give "*full* consideration [to] the government's interest in the effective and efficient fulfillment of its responsibilities to the public," *id.* at 1692 (emphasis added), and we must *not* demand that the government employer "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action," *id.* (footnote omitted).

With these well-worn principles in mind, we must first decide whether McPherson was fired for her expressed views on a matter of public concern. She has maintained throughout this litigation that her statement was meant as a criticism of the President's social and economic policies, and no one has contended that she could constitutionally be fired merely for criticizing those policies. A difficulty arises, however, because she chose such a repulsive, nigh obscene, manner of making her criticism. Had she been fired solely for the disgusting manner of her expression, the first amendment would arguably pose no barrier to Constable Rankin's employment decision. We doubt that public employees could wrap the protective mantle of the first amendment around a string

of gutter words simply by appending a remark to the effect that those words describe some public figure or policy.

However, McPherson was undoubtedly fired because of the *content* of her speech. The district court judge found that McPherson's comment was "something more" than political hyperbole and he was apparently persuaded that she was fired because she honestly hoped that any future assassination attempt would be successful. Whatever her subjective intent, that is what she said and it is quite plausible that Rankin was telling the truth when he said that that is why he fired her.[1] Because the life and death of the President are obviously matters of public concern, we are therefore required to engage in *Pickering/Connick* balancing and to decide whether society's interest in protecting McPherson's freedom of speech is outweighed by the constable's interest in having employees who do not favor political assassination.

-2-

Constable Rankin is elected to a four-year term on a partisan ballot from Precinct One in Harris County, Texas. This precinct, with approximately three hundred fifty thousand residents, encompasses downtown Houston and a portion of its suburbs. It is wholly within the police jurisdiction exercised by the City of Houston and nearby suburban municipalities. The constable's office, which had eighty-odd employees in 1981, has no direct law enforcement role, and none of its deputies are "on

---

1. Were there a substantial contention that McPherson was actually terminated for expressing disapproval of the President's policies, we would be faced immediately with the standard-of-review problems discussed *infra* Section III.3.

the street." Its primary mission is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars. Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts. Though Rankin hinted that his office might somehow participate in providing security during presidential visits to Houston, he never explained how this might be, and the district judge did not regard it as a serious suggestion.

All employees in the office are officially referred to as "deputy constables," but only those who are commissioned peace officers may carry firearms, serve process, or execute warrants. To become a commissioned peace officer, one must undergo a background check, a psychological exar , and over 300 hours of training. McPherson, who received only two days of computer instruction when hired, was not a commissioned peace officer. She played an entirely clerical role within the office: seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT.

McPherson testified without contradiction that her statement about the attempted assassination was made at the end of a discussion about the President's policies with a co-worker, Lawrence Jackson, whose duties were identical to hers. At trial, Jackson corroborated McPherson's testimony and explained that he understood her remark as merely "a response and an expression." He was not cross-examined. McPherson testified that Constable Ran-

kin did not allow her to explain the context of the overheard remark; Jackson, the witness to its context, was not consulted. Indeed, Rankin does not deny that the remark was part of a discussion between two employees about their opinions of the President's policies; he testified that because McPherson conceded that she "meant" the remark, he felt no duty to inquire further.

-3-

For the purpose of applying the *Pickering/Connick* balancing test, we accept the district court's conclusion that McPherson actually hoped that the President would be assassinated. The precise fit of the clearly erroneous standard of review and our duty to make "an independent constitutional judgment on the facts of the case," *Connick*, 103 S. Ct. at 1692 n. 10 (quoting *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964) (opinion of Brennan, J.)), is not altogether clear. We are enjoined to "determine the meaning and application of those words of [the Constitution] which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character which the principles of the First Amendment . . . protect." *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) (footnote omitted). The task of simultaneously applying both independent and deferential standards of review is of course more difficult at their juncture than at their distant edges. *See generally, Bose Corp. v. Consumers Union of United States, Inc.*, 104 S. Ct. 1949 (1984). For example, when what was said and its context are undisputed, the con-

stitutional "status" of the speech is to be independently examined by an appellate court. When what was said, but not its context, is disputed, the choice belongs to the trier of fact; on appeal, the determination of what was said is subject to review by the clearly erroneous standard, and the constitutional "status" of the statement is given independent review. Yet, when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain: factual conclusions about the speaker's intent, audience effect, and other elements of context are not so easily disentangled from a decision as to whether a statement was "political" or directed at "public concerns."

[2] With this caution in mind, we find that the record supports the district court's conclusion that McPherson expressed an actual wish for the assassination of the President. It is true that she has at every stage of this litigation denied that this was her view or the purpose of her statement, and she is supported by the only person who heard the remark in context. McPherson's subjective intent, however, was an historical fact, and her statement to Rankin that she "meant" what she said provides the requisite support for the district court's "factual" finding, which may have been based in part on the demeanor of the witnesses. The question is close, resting ultimately on an inference drawn from the inevitably ambiguous response to the question, "Did you mean it?" That inference is a slender but adequate reed: we are not left with the firm belief that a mistake was made in this finding of fact by the district court.

[3] Regardless of her intent, however, McPherson's comment clearly addressed a matter of public concern.

Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern. Thus, the value of protecting her right to express her opinion, however loathsome, must be weighed against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities.

-4-

[4] We are persuaded that the government's interest in maintaining an efficient office does not outweigh the first amendment interest in protecting McPherson's freedom of expression. Her comment was made to a coworker who, with the benefit of the remark's full context, was not offended. Constable Rankin specifically denied having fired her because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office.

[5] The government's strongest argument lies in Constable Rankin's contention that he should not have to employ *anyone* who "rides with the cops and cheers for the robbers." We understand this to mean that a government agency is entitled to employ only those individuals who have no serious reservations about the fundamental mission of the agency. Just as a hospital has a legitimate interest in ensuring that its employees are not committed to euthanasia, so a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination. We therefore agree that Constable Rankin's action in dismissing McPherson was

based on an important and legitimate government interest.[2]

---

2. The government's interest in requiring that employees be loyal to the mission of the agency for which they work is somewhat different from the government's interest in limiting employees' criticism of their supervisors. The distinction can be illustrated by comparing this case with *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984). In *Yoggerst*, an employee of a state agency, after seeing newspaper reports that the agency's director had been fired, asked a co-worker, "Did you hear the good news?" After being disciplined for this remark, the employee resigned and brought suit pursuant to 42 U.S.C. § 1983. The Seventh Circuit held that the remark was not speech on a "matter of public concern" under *Connick*: "It is clear from the content of Yoggerst's statement that she was speaking *in her role as an employee* about her personal feelings and not in her role as a citizen on a matter of public concern. . . . The content of Yoggerst's speech was clearly about her relationship with the Director, a matter of no public concern; the fact that she spoke at a time when the Director's continued tenure in office was a matter of public interest does not alter this characterization." 739 F.2d at 296 (emphasis added) (citation omitted). Thus, the result in *Yoggerst* was dictated by the central principle enunciated in *Connick*: the Constitution "does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State. . . . [T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over *internal office affairs*." *Connick*, 103 S. Ct. at 1690, 1691 (emphasis added).

Unlike Yoggerst's comment, Ardith McPherson's remark had no direct bearing on internal office affairs and was made in her role as citizen rather than in her role as a public employee: her assassination remark was made in the context of a discussion of Reagan administration policies. This distinction may strike some as unduly artificial, for it is true that an acceptance of political assassination, like acceptance of the illegal overthrow of the government, reflects a generalized disloyalty to the very principles on which our public institutions operate. Any government official would properly be quite distressed to find his subordinates expressing such disloyalty, and we acknowledge that there are arguments for the proposition that the first and fourteenth amendments, properly interpreted, do not require government agencies to employ persons who are opposed to the fundamental principles on which our government is based. The Supreme Court, however, has rejected these arguments and foreclosed our consideration of them. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (state may not constitutionally bar employment as public school teachers to persons who knowingly belong to organizations seeking the unlawful overthrow of the government); *Connick*, 103 S. Ct. at 1688-89 (reviewing related cases and reaffirming *Keyishian*).

[6] The difficulty with the government's position in this case, however, is that McPherson's duties were so utterly ministerial and her potential for undermining the office's mission so trivial. McPherson was one of about a dozen clerk-typists working in a closed room. She was not a law enforcement officer and she had none of the discretion or power associated with that position. Her job did not bring her into contact with the public, and the district court was not persuaded that she had any access to sensitive or important files. Were any of these factors different, we would have a different case. But in these distinct circumstances, we cannot say that McPherson could constitutionally be fired for her expression of political opinion. Absent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required. A large body of first amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our first amendment jurisprudence is a boast that in a free society foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

REVERSED and REMANDED for determination of an appropriate remedy.

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NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CONSTABLE WALTER H. RANKIN
and HARRIS COUNTY, TEXAS,
Petitioners

v.

ARDITH McPHERSON,
Respondent

On Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITIONERS' BRIEF ON THE MERITS

MIKE DRISCOLL*
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners

*Counsel of Record

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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PETITIONERS' BRIEF ON THE MERITS

RULE 34(a) COMPLIANCE

QUESTIONS PRESENTED FOR REVIEW

1. Does a Deputy Constable serving at the pleasure of the Constable have a constitutional right to speak out favoring the assassination of the President of the United States?

2. Does a law enforcement officer have a constitutional right to speak out in favor of violations of the law the officer has undertaken to enforce?

RULE 34(b) COMPLIANCE

PARTIES TO THIS PROCEEDING

PLAINTIFF

Ardith S. McPherson
Attorney Annie S. Garcy
Attorney Bruce V. Griffiths

DEFENDANT

Constable Walter H. Rankin

Harris County Commissioners Court
County Judge Jon Lindsay
County Commissioner El Franco Lee
County Commissioner Jim Fonteno
County Commissioner Bob Eckels
County Commissioner E. A. Lyons, Jr.
County Attorney Mike Driscoll
Assistant County Attorney Billy E. Lee

INDEX

	Page
RULE 34(a) COMPLIANCE—QUESTIONS PRESENTED FOR REVIEW	I
RULE 34(b) COMPLIANCE—PARTIES TO THIS PROCEEDING	II
RULE 34(d) COMPLIANCE—CITATIONS TO JUDGMENTS BELOW	1
RULE 34(e) COMPLIANCE—JURISDICTIONAL GROUNDS AND TIME FACTORS	1
RULE 34(f) COMPLIANCE—CONSTITUTIONAL AND STATUTORY PROVISIONS	2
RULE 34(g) COMPLIANCE—STATEMENT OF THE CASE	5
RULE 34(h) COMPLIANCE—SUMMARY OF ARGUMENT	6
RULE 34(i) COMPLIANCE—ARGUMENT	7
RULE 34(j) COMPLIANCE—CONCLUSION	14
CERTIFICATE OF SERVICE	16
APPENDIX TO BRIEF—ATTORNEY GENERAL OF TEXAS OPINION NO. 0-7081	1a

LIST OF AUTHORITIES

CASES

	Page
Cunningham v. Neagle, 135 U.S. 1 (1890)	14
Dixon v. McMullen, 527 F. Supp. 711 (N.D. Tex. 1981)	10
Foley v. Connelie, 435 U.S. 291 (1978)	10
Garza v. Rodriguez, 559 F.2d 259 (5th Cir. 1977), *cert. den.* 439 U.S. 877	10
Heye v. Moody, 67 Tex. 615, 4 S.W. 242 (1887)	8
Kelley v. Johnson, 425 U.S. 238 (1976)	11
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976)	11
McBee v. Jim Hogg County, Texas, 703 F.2d 834 (5th Cir. 1983)	8
McBee v. Jim Hogg County, Texas, 730 F.2d 1009 (5th Cir. 1984)	9
Morrow v. State, 140 Tex. Crim. App. 586, 147 S.W.2d 248 (1941)	14
Murray v. Hair, 112 S.W.2d 1091 (Tex. Civ. App., Amarillo, 1938, error dism.)	8
Tanner v. McCall, 625 F.2d 1183 (5th Cir. 1980), *cert. den.* 451 U.S. 907	9

UNITED STATES CONSTITUTION

First Amendment	1
Fourteenth Amendment	1

UNITED STATES STATUTES

28 U.S.C. § 1201(c)	1
28 U.S.C. § 1343(3)	1
28 U.S.C. § 1343(4)	1
28 U.S.C. § 2201	1
28 U.S.C. § 2202	1
42 U.S.C. § 1983	1
42 U.S.C. § 1988	1

TEXAS CONSTITUTION

Article XVI, § 1	2

VERNON'S TEXAS CIVIL STATUTES

Article 6869	3, 7
Article 6879a	4, 7
Article 6879b	5

RULE 34(d) COMPLIANCE

CITATIONS TO JUDGMENTS BELOW

1. District Court Judgment, April 15, 1983—Record, Document No. 24; Joint Appendix, 34; not published.
2. Court of Appeals Opinion, July 12, 1984—Record, Document No. 30; Joint Appendix, 44; published at 736 F.2d 175.
3. District Court Judgment, February 4, 1985—Record, Document No. 38; Joint Appendix, 122; not published.
4. Court of Appeals Opinion, March 19, 1986; Record, Document No. 44; Joint Appendix, 123; published at 786 F.2d 1233.

RULE 34(e) COMPLIANCE

JURISDICTIONAL GROUNDS AND TIME FACTORS

(i) 28 U.S.C. § 1201(c) authorizes this appeal.

(ii) Plaintiff alleged jurisdiction in her petition under the First and Fourteenth Amendments to the Constitution, and under 42 U.S.C. §§ 1983 and 1988, as well as under 28 U.S.C. § 1343(3) and (4), and 28 U.S.C. §§ 2201 and 2202. The Constable did not challenge any of those jurisdictional allegations in the Trial Court, in the Court of Appeals, nor does he do so in this Court.

(iii) the opinion of the Court of Appeals was entered on March 19, 1986.

(iv) No rehearing was requested.

(v) Petition for Writ of Certiorari was filed June 17, 1986.

(vi) Certiorari was granted October 20, 1986.

RULE 34(f) COMPLIANCE

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article XVI, § 1, Constitution of Texas

§ 1. Official Oath

Section 1. Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, _____, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of _____ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or the confirmation thereof. So help me God."

Article 6869, Vernon's Texas Civil Statutes

Art. 6869. [7125] [4896] May Appoint deputies, etc.

Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the official oath, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the County Clerk and deposited in said office. The number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the Justice precinct in which is located the county site of such county, and one in each Justice precinct, and a list of these appointments shall be posted up in a conspicuous place in the Clerk's office. An indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff. Provided further, that if in the opinion of the Commissioners' Court fees of the sheriff's office are not sufficient to justify the payment of salaries of such deputies, the Commissioners' Court shall have the power to pay the same out of the General Fund of said county.

Article 6879a, Vernon's Texas Civil Statutes

Art. 6879a. Appointment of Deputies

Section 1. The duly elected Constable in each Justice Precinct may appoint Deputies in accordance with the provisions of Section 2 of this Act, and each and every instance said Deputy Constables shall qualify as required of Deputy Sheriffs.

Sec. 2. When the Constable in each and every instance named and described in the preceding section of this Act shall desire to make appointment of a Deputy or Deputies, as the case may be, said Constable shall first make written application to the Commissioners' Court of his County showing that it is necessary for such Constable to have the Deputy or Deputies requested in order to properly handle the business of his office originating in the Precinct in which such Constable has been elected, giving the name of each proposed appointee; and if the Commissioners' Court shall find that the Constable is in need of the Deputy or Deputies requested to handle the business originating in his Precinct, then and in that event, and in that event only, the Commissioners' Court shall approve and confirm the appointment of the Deputy or Deputies provided by this Act.

Sec. 3. Any person who serves as a Deputy Constable without the provisions hereof having been complied with relative to his appointment or any Constable who issues a Deputyship without the consent and approval of the Commissioners' Court shall be fined not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1,000.00).

Article 6879b, Vernon's Texas Civil Statutes

Art. 6879b. Responsible for Deputies' Acts

Constables shall be responsible for the official acts of their deputies, and they shall have power to require from their deputies bond and security; and they shall have the same remedies against their deputies and the sureties of said deputies as any person can have against a constable and his sureties.

RULE 34(g) COMPLIANCE

STATEMENT OF THE CASE

On January 12, 1981, Constable Rankin appointed Ardith McPherson his Deputy Constable. Appointments are probational for a 90 day period, during which the appointing officer and the appointee may each determine if this is a satisfactory relationship that they desire to continue indefinitely. On March 30, 1981, prior to the expiration of the probation period, an attempted assassination was committed on President Reagan. A radio in the work area where McPherson was assigned carried a news report of the attempt, adding that the President had been hastened away in apparently uninjured condition. McPherson had lunched earlier and was working her computer. She told a fellow Deputy working with her: "I hope that if they go for him again, they get him." (J. A. 12; R. Document 1). Some other Deputies in her work area either did not hear or paid no attention to her comment, but one, Captain LeVrier, did hear and confronted her with whether she meant what she said. At both trials, Captain LeVrier testified that she said she did mean it. At both trials, McPherson denies that she

said anything to her superior's question, but just smiled at him. Captain LeVrier reported the incident to his superior, Captain Riley, who then reported it to Constable Rankin. The Constable questioned Captain LeVrier, then summoned McPherson to his office. At both trials the Constable testified that she admitted making the statement and that she meant it. At both trials, McPherson admitted that she said the statement, but denied that she meant it.

Constable Rankin testified (J. A. 83) that after questioning her, he lost all confidence that he could ever be comfortable with her in a law enforcement office. He terminated her as his Deputy.

RULE 34(h) COMPLIANCE

SUMMARY OF ARGUMENT

Under Texas law, a Constable appoints a Deputy to assist him in the performance of his duties. The Deputy serves at the pleasure of the Constable. The Deputy is the alter ego of the Constable. In the eyes of the public who elected the Constable, but not the Deputy, the Deputy IS the Constable. The public rightly holds the Constable responsible for whatever the Deputy does.

The Constable is a law enforcement officer of the State of Texas. By force of law, his Deputies are also law enforcement officers. He, and his Deputies, are sworn to preserve, protect, and defend the Constitution and laws of the United States and of this State. Murder is prohibited by all civilized nations and states, as well as by others that are not so civilized. Murder of the President is prohibited by Congressional statute. It is inconsistent for a

Deputy sworn to preserve, protect and defend the Constitution and laws of the United States and Texas to voice a desire for some of those same laws to be violated. The character and honesty of such a person is beclouded, even by talk, in the environment of a law enforcement office. A Constable, with a responsibility to the people who elected him to enforce the laws, cannot have confidence in a Deputy, who is his alter ego to the public, who wants a very heinous crime perpetrated.

RULE 34(i) COMPLIANCE

ARGUMENT

Article 6869, Vernon's Texas Civil Statutes, authorizes a Sheriff to appoint Deputies to continue in office at the pleasure of the Sheriff. A Deputy shall have the power and authority to perform all the acts and duties of the principal. The Deputy is required to take and subscribe to the official oath.

Article 6879a, Vernon's Texas Civil Statutes, authorizes a Constable to appoint Deputies, who shall qualify as required of Deputy Sheriffs. A Constable can appoint ONLY Deputies. We have placed in an appendix to this Brief a copy of Attorney General of Texas Opinion No. O-7081 (1946), which holds that Article 6879a controls the appointment of Deputies by the Constable, that the Deputies serve at the pleasure of the Constable, and that other Texas statutes that authorize County officers (including Constables) to appoint Deputies and assistants is not applicable to a Constable. [In the Re: on page 1 of the Opinion, Article *6897a* is an obvious transposition of Article 6879a, and on page 4 of the Opinion a reference to House Bill *350* is incorrect—the reference on

page 3 of the Opinion to House Bill *850* is correct.] Accordingly, all the appointments of people to assist a Constable in the performance of his official duties are his Deputies. The Constable in a large metropolitan area, such as Houston, has many more demands on his official time than can be supplied by his one body, and necessity compels him to utilize the assistance of many Deputies to accomplish his official duties where and when needed.

A hundred years ago the Supreme Court of Texas wrote of the Deputy relationship with the superior in *Heye v. Moody,* 67 Tex. 615, 4 S.W. 242, 243 (1887):

> . . . (A)s to the public, whose servants these officers are, the acts of the deputy are the acts of the principal. The possession of the former is the possession of the latter. So far as the responsibilities of the office are concerned, the sheriff is liable for the acts both of himself and his deputy. . . .

A half century ago, in the case of *Murray v. Hair,* 112 S.W.2d 1091, 1093 (Tex. Civ. App., Amarillo, 1938, error dism.), it was held:

> . . . Deputies so appointed are vested with duties and powers which involve a public trust, and the responsibility for the proper discharge of duties relating to the public peace and enforcement of the laws of the state rest upon their shoulders in the same manner and to the same extent as they rest upon the shoulders of their principals. . . .

In *McBee v. Jim Hogg County, Texas,* 703 F.2d 834, 839 (5th Cir. 1983), the Court noted that each of a Deputy's actions, as varied as they may be, represent the implementation of policies of the department as a whole.

The principal, as the elected official, is responsible for employing those individuals whose actions will ensure that his policies are carried out.

That case was then heard en banc, *McBee v. Jim Hogg County, Texas,* 730 F.2d 1009, 1017 (5th Cir. 1984). That Court said:

> Relevant to the determination of disruptive effect is the time, place and manner of the political activity. The *Connick* court, for example, noted that the employee in that case used work time and work space, commenting that employee speech that did not do so "might lead to a different conclusion." . . .

While *Tanner v. McCall,* 625 F.2d 1183 (5th Cir. 1980), *cert. den.* 451 U.S. 907, was a Florida case involving a Sheriff, the Court's exposition of the applicable law is equally applicable to a Texas Constable, and particularly to Constable Rankin in the instant proceeding. At page 1186 of the Reporter the Court said:

> . . . A deputy is the sheriff's alter ego and has all the sheriff's sovereign powers, except the power to appoint other deputies. A deputy's actions are those of the sheriff and the sheriff is civilly liable for those actions:
>
> > It is essential to law enforcement in the various counties of the State that the people shall be able to place responsibility upon a particular individual, the sheriff. He and he alone appoints his deputies and is responsible for them. It was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else.

The Courts have always realized that those officers who are engaged in enforcing the law are judged by different standards than are applied to the average citizen. This recognition is aptly stated in *Dixon v. McMullen,* 527 F. Supp. 711 (N.D. Tex. 1981), at page 721:

> . . . The rationale is to insure that those persons publicly employed in emergency or dangerous situations are sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law. After all, state police are charged with the enforcement of the law, not for themselves or their clients as in private practice, but for the benefit and safety of people at large. . . .
>
> . . .
>
> Policemen are just simply a special category. Integrity and trust are prerequisites. The law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which never can be re-enacted or reversed. . . .

Garza v. Rodriguez, 559 F.2d 259 (5th Cir. 1977) *cert. den.* 439 U.S. 877 upheld a firing of a probation officer because speech in which he engaged evidenced character traits undesirable in an employee.

This Court has often taken note that police work is an exceptional occupation. *Foley v. Connelie,* 435 U.S. 291, 297 (1978) recognizes some reasons for exceptional treatment of officers.

> A discussion of the police function is essentially a description of one of the basic functions of government, especially in a complex society where police presence is pervasive. The police function fulfills a

most fundamental obligation of government to its constituency. Police officers in the ranks do not formulate policy, *per se,* but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The execution of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life. Our Constitution, of course, provides safeguards to persons, homes and possessions, as well as guidance to police officers. . . .

. . .

p. 298

. . . That this prophylactic authority is essential is attested by the number of police officers wounded or killed in the process of making inquiry in borderline, seemingly minor violation situations—for example, where the initial stop is made for a traffic offense but, unknown to the officer at the time, the vehicle occupants are armed and embarked on serious criminal conduct.

Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of "the common occupations of the community" . . . A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other "common occupations of the community" who exercises no broad power over people generally. . . .

Kelley v. Johnson, 425 U.S. 238 (1976), and *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307 (1976), also recognize that the good of the service justifies a stricter course of conduct for the police officer than is justifiable for the average citizen.

At pages 130-131 of the Joint Appendix, the panel of the Fifth Circuit Court of Appeals concluded that Constable Rankin's office has "no direct law enforcement role and none of its deputies are 'on the street.' " That summation is incorrect. The panel is correct in its statement that the PRIMARY mission of the office is the service of process and execution of warrants limited to Class C misdemeanors carrying a maximum fine of $200. The Constable can agree with the Court panel as to the PRIMARY mission of his office, but cannot agree that he and his Deputies do not take any other action as peace officers when necessary. Since Miss McPherson was terminated as his Deputy, Constable Rankin has had to bury his Deputy Al Garza, who just happened to get in the way of a robber's bullet in a local jewelry store. His Deputy, Captain Frank Davis, was out of action for considerable time when he was shot through the door while serving civil process. Captain LeVrier testified (R. Document 22, page 49) that he had been security personnel many times for the President of the United States, since his first experience in 1936 with President Roosevelt. Constable Rankin testified (R. Document 22, page 62) that he was the last officer to shake hands with President Kennedy in Houston the day before he was killed. Constable Rankin was security for Governor Connally in the Kennedy entourage. When President Kennedy was killed Governor Connally was also shot—and the officer acting as his security was killed. One day and 240 miles kept the Constable alive for this instant assault on him. Assassins usually are not world class marksmen. Police officers guarding public figures frequently take bullets intended for the person they are guarding. Hinckley wounded not only President Reagan, but also one of the security

officers guarding the President, and Presidential Aide Brady.

The panel of the Fifth Circuit made much that McPherson's statement did not disrupt the office. That panel was several years and several hundred miles from ground zero. Captain LeVrier was greatly upset over the declaration by McPherson. When she refused to recant, Captain LeVrier disclosed her attitude to the Constable, through channels. After checking her words and attitude with her, the Constable lost all confidence in her acting as his Deputy, and doing his job for him as he himself would do the job if he had that much time.

The Court of Appeals panel deprecates the ministerial duties performed by McPherson and her lack of authority. She was doing the work of the Constable—work he would have to do himself if he did not have trusted Deputies doing it. Not all the Constable's work is shooting or arresting thugs. There is a tremendous amount of paper work involved. Telephones need to be answered. Information needs to be filed, or forwarded, or put into computers. There is no need for all Deputies to be certified Peace Officers. Especially one who is still in her probationary period of look-see. Her conversationalist, Deputy Jackson, was a certified Peace Officer, as was her immediate supervisor. Other computer Deputies were taking classes to become Certified. Being a part of the team, an efficient member, a trusted, capable Deputy, does not require that everybody be certified to wear and use a firearm. It does require that the Constable and all the other Deputies have confidence that all those on whom they depend are in fact dependable doing their job.

In *Morrow v. State,* 140 Tex. Crim. App., 586, 147 S.W.2d 248 (1941), the Court held that a fellow working with piping was doing plumbing work, even though he was not a licensed plumber. A stenographer in a law office taking dictation is doing legal work, but is not enaged in practicing law. A receptionist answering the phone for a dentist is engaged in dental work, but is not engaged in the profession of practicing dentistry.

In the same vein, Constable Rankin's secretary, his telephone receptionists, his computer operators, his file clerks, ALL are his Deputies and are doing his work. A need exists for all of them if he is to do his duty owing to the public. In *Cunningham v. Neagle,* 135 U.S. 1, 55-56 (1890), this Court told that many duties of a Judge are performed outside of the Courtroom. Chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the Courthouse. Performance of Judicial duty consists of more than filing of a judgment and announcing results in open Court.

RULE 34(j) COMPLIANCE

CONCLUSION

The advocacy of violation of National and State laws by the Deputy of the Constable, in open defiance of her oath to preserve, protect and defend the Constitution and laws of the United States and of Texas, caused the Constable to lose confidence in her to be his Deputy and perform his duties assigned to her as he himself would perform those duties. The District Court conducted two trials of this cause and upheld the Constable both times. The Court of Appeals disregarded the findings of the District

Court and made its own independent constitutional judgment on the facts of the case. This was error. The opinion of the Court of Appeals should be reversed and the judgment of the District Court should be affirmed. Constable Rankin so moves the Court.

Respectfully submitted,

MIKE DRISCOLL
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101

Attorneys for Petitioners
Constable Walter H. Rankin

CERTIFICATE OF SERVICE

This is to certify that on this 17th day of December, 1986, I caused a signed true copy of the Petitioners' Brief on the Merits to be placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent herein:

Annie S. Garcy, Esq.
4848 Loop Central, Suite 800
Houston, TX 77081

Bruce V. Griffiths, Esq.
1236 West Gray
Houston, TX 77019

Billy E. Lee

BILLY E. LEE
Assistant County Attorney

APPENDIX TO BRIEF

OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

GROVER SELLERS
Attorney General
Honorable Olan R. Van Zandt
County Attorney
Grayson County
Sherman, Texas

Dear Sir:

Opinion No. 0-7081

Re: Does the Commissioners Court have the authority to rescind the appointment of a deputy constable made in compliance with Article 6897a, V.A.C.S., and related quesitons?

From your letter requesting our opinion upon the above captioned matter, we quote in part as follows:

"1st.

Does the Commissioners' Court have the authority to rescind the appointment of a Deputy Constable made in compliance with Article 6879a, Vernon's Annotated Statutes?

"2nd.

The precinct officers of Grayson County, Texas, are on a fee basis. If a Constable in Grayson County fails to petition the Commissioners' Court of Grayson County in January, 1946, under the provisions directed under Article 3902 of Vernon's Annotated

---

No communication is to be construed as a departmental opinion unless approved by the Attorney General or First Assistant

Statutes for a Deputy Constable, does his failure to so petition terminate the appointment of his Deputy theretofore authorized by the Commissioners' Court?

"3rd.

The petition to appoint a Deputy and the consent of the Commissioners' Court thereon was for no certain time. At what time in view of the above facts would an appointment be terminated?"

You enclosed a letter to you from J. N. Dickson, County Judge, which reads in part as follows:

"For your information:

Walter Self was duly elected Constable of Justice Precinct No. 6, Grayson County at the General Election of November 7, 1944, and qualified as said Constable on January 1, 1945. Under Article 6879a RCS, said Constable would be entitled to one deputy upon compliance with the statutes in making request therefor. Vo. 5, Page 124 Commissioners' Court minutes of Grayson County has recorded thereon the request of Walter Self for a deputy constable and the Courts approval thereof and reads as follows:

" 'November 1, 1945

Court in Special Session on this the 1 day of November, A.D. 1945,

" 'Whitesboro, Texas
October 20, 1945

"State of Texas
County of Grayson

"To the County Commissioners of Grayson County. This is to certify that I am in need of a deputy Constable to help enforce the law in my Precinct

and would respectfully ask you to appoint J. W. Kanaday as my deputy.

"This appointment will meet the approval of Justice of Peace here.

Walter Self
Constable Prect. 6

"Approved by C. L. Simpson,
/s/ C. L. Simpson'

After due consideration by the Court the above application is granted'.

"In view of the above facts:

"(1) Does the Commissioners Court have authority to rescind the appointment of said deputy Constable, J. W. Kanady?

"(2) The Constable, Walter Self, is compensated by fees of office and not from the Officers Salary fund. If he does not petition the Commissioners Court as provided in Art. 3902 R.C.S. for a deputy Constable for 1946—Would the fact that he did not petition during January 1946 void the deputation of deputy, J. W. Kanady and would he be without authority to act as deputy constable until a request was made to the Commissioners Court and said request approved by the Court?

"(3) The petition to appoint a constable was for no certain time as shown heretofore. At what time, in view of the above facts, would his appointment be terminated?"

Article 3902, V.A.C.S., as amended in 1931 by House Bill No. 434, Ch. 214, reads in part, as follows:

"Article 3902. Whenever the county judge, sheriff, county clerk, county attorney, district clerk, tax collector, tax assessor, justice of peace and *constable*

shall require the services of deputies or assistants in the performance of his duties, he may apply to the county commissioners court of his county for authority to appoint such deputies or assistants, setting out by sworn application the number needed, the position sought to be filled, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts and disbursements of the office; . . . ."

This amendment was approved May 26, 1931.

House Bill No. 850, Ch. 280 was passed by the 42d Legislature on the following day. This act was later incorporated in Vernon's Statutes as Article 6879a and 6879b and reads, in part, as follows:

"Section 1. The duly elected constable in each justice precinct having a city or town of less than eight thousand (8000) population according to the preceding Federal census may appoint one (1) deputy and no more; and each justice precinct having a city or town of eight thousand (8000) and less than forty thousand (40,000) population according to the preceding Federal census may appoint two (2) deputies and no more; and in each justice precinct having a town or city of forty thousand (40,000) population or more according to the precering Federal census may appoint five (5) deputies and no more, and each and every instance said deputy constables shall qualify as required of deputy sheriffs.

"Sec. 2. When the constable in each and every instance named and described in the preceding section of this act shall desire to make appointment of a deputy or deputies, as the case may be, said constable shall first make written application to the commissioners court of his county showing that it

> is necessary for such constable to have the deputy or deputies requested in order to properly handle the business of his office originating in the precinct in which such constable has been elected, giving the name of each proposed appointee; and if the commissioners court shall find that the constable is in need of the deputy or deputies requested to handle the business originating in his precinct, then and in that event, and in that event only, the commissioners court shall approve and confirm the appointment of the deputy or deputies provided by this act."

House Bill No. 350 would control over House Bill No. 434 as to the appointments of deputy constables, for the reason that it is a special law dealing solely with such appointments, while House Bill No. 434 is a general law dealing with the appointments of deputies and assistants to county and precinct officers. Further House Bill No. 850 was passed subsequently to House Bill No. 434.

In 1935 at the 2nd called session of the 44th Legislature Senate Bill No. 5, Ch. 465, in placing district, county, and precinct officers on a salary basis, and in prescribing their compensation, amended Article 3902 and therein prescribed the maximum salary to be paid deputies, assistants, and clerks in counties according to various population brackets. The same act, after providing that:

> "In all counties in this State such precinct officers shall continue to be compensated for their services on a fee basis until the Commissioners' Court shall have determined otherwise in accordance with the provisions of Section 2 of this Act." Then provided:
>
> ". . . .
>
> "In counties in which *precinct officers* are paid a *salary* as compensation for their services, such officers desiring to appoint one or more deputies or assistants shall make application to the Commis-

sioners' Court for authority to appoint such deputy or deputies, in the manner and form prescribed for applications for deputy county officers by Article 3902, Revised Civil Statutes 1925, as amended within the provisions of this Act; . . ." (Emphasis added)

Such act further provided:

"(h) Whenever any district or county officer, *or precinct officer when such officer is compensated on a salary basis,* with the exception of district attorneys and criminal district attorneys, shall require the services of deputies, assistants, and employees in the performance of his duties he shall apply to the Commissioners' Court for authority to appoint such deputies, assistants, and employees, stating by sworn application the number needed, the position to be filled, the duties to be performed, and the amount to be paid. Said application shall be accompanied by a statement showing the probable receipts from fees, commissions, and compensation to be collected by said office during the fiscal year and the probable disbursements which shall include all salaries and expenses of said office; and said court shall make its order authorizing the appointment of such deputies, assistants, and clerks and fix the compensation to be paid them within the limitations herein prescribed and determine the number to be appointed as in the discretion of said court may be proper; . . . ." (Emphasis added).

Thus, it is seen that in counties wherein the precinct officers are on a fee basis the provisions of Article 3902 requiring the application for the appointment of a deputy constable to be by sworn application and stating the amount to be paid and accompanied by a statement showing the probable receipts and disbursements of the office, is not applicable, and that in such counties the constable would merely have to follow the provisions of said Article 6879a which provides that the constable shall make

written application to the Commissioners Court of his County showing that it is necessary for such constable to have the deputy or deputies requested in order to properly handle the business of his office.

The case of the Sheriff of Salt Lake County v. Board of Commissioners of Salt Lake County (Sup. Ct. of Utah, 1928) 268 Pac. 783, involves the power of the County Commissioners' Court of Salt Lake County to suspend or remove from office deputies of the county against their will and that of the sheriff. In that case the court said:

> "When the term or tenure of a public officer is not fixed by law, the general rule is that the power of removal or suspension, unless controlled by statute, is an incident to the power of appointment. In such case the office is held during the pleasure of the authority making the appointment, and in the absence of a statute on the subject no notice or charges or hearings are required for the suspension or removal by the authority appointing the officer. 22 R. C. L. 562-576. The appointment of the deputies here was not for any fixed or stated term or period. What divides the parties is this: The commissioners contend that the appointing power was with them and that they, in legal effect, appointed the deputies, and hence that they had the authority to summarily suspend or remove them at pleasure with or without cause; that the sheriff and the deputies dispute and urge that the power of appointment and summarily to suspend or remove the deputies rested with the sheriff, so long as the office itself was not abolished or that the purpose or necessity for which the deputies were appointed no longer existed, a matter not here claimed or involved. That is to say, the deputies were not suspended or removed for any reason that the purpose or necessity for which they were appointed no longer existed, or had ceased.

"The statute, section 1461, Comp. Laws Utah 1917, provides that 'every county . . . officer . . . may, by and with the consent of the board of county commissioners, appoint as many deputies and assistants as may be necessary for the prompt and faithful discharge of the duties of his office,' . . .

"The sheriff's office is an elective office of the county, as is also the office of a county commissioner, and is a co-ordinate office or branch of our county government. His powers and duties are prescribed by statute and are similar to those generally prescribed by other western states. In performing them, he, generally speaking, acts independently of the board of county commissioners except as otherwise restricted and specified by statute. Except by and with the consent of the board of county commissioners he may not make a binding or completed appointment of a deputy or deputies, and until such consent is had and such deputy has taken the oath of office, he, in law, is not a deputy and may not act or perform official functions or offices as such. While the matter may not be entirely free from doubt, yet we are of the opinion that proper construction and interpretation of section 1461 is that it is the county officer, here the sheriff, who appoints his deputy or deputies, but that such appointment does not become effective or binding until consented to by the board of county commissioners and the person so appointed has taken the oath of office; and therefore, whatever summary power of suspension or removal of a deputy may be exercised is to be exercised by the sheriff and not by the board of county commissioners, . . . Such view is also in harmony with the provisions of the section that 'any officer appointing any deputy shall be liable for all official acts of such deputy,' which is in recognition of the principle 'that those in charge of and responsible for administering functions of government,

> who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint' (Myers v. United States, supra). Certain it is that the board of commissioners is not nor are any of its members in any sense civilly or otherwise liable for the official acts of a deputy sheriff but the sheriff is so civilly liable. . . ."

In the case of Murray v. Harris (Amarillo Court of Civil Appeals, 1938) 112 S.W. 1092, the court said at page 1093:

> "The statute conferring upon the sheriff the power to appoint deputies fixes no definite term of office, but provides that the tenure shall be at the pleasure of the sheriff, which is tantamount to a provision that both the appointment and tenure are discretionary with him . . ."

We therefore answer your questions as follows:

1. The Commissioners Court does not have the authority to rescind the appointment of a deputy constable made in compliance with Article 6879a V.A.C.S. The constable makes the appointment and is the only person who can discharge him.

2. We answer your second question to the effect that the failure of the constable to petition the Commissioners Court in January, 1946 does not terminate the appointment of his deputy theretofore authorized by the Commissioners Court. A deputy constable is appointed for no certain time, serves at the pleasure of the constable, or until the expiration of the term of office of the constable.

3. Your third question is answered to the effect that an appointment made by a constable will only terminate upon the following contingencies:

a. Being discharged by the Constable.

b. At the expiration of the Constable's term of office.

c. By resignation of the Constable.

d. By the death of the Constable.

e. By resignation of the deputy.

f. By death of the deputy.

g. By a judgment of ouster by a district court in a quo warranto proceeding instituted by the County Attorney to test the validity of the appointment.

We trust the above and foregoing fully answers your inquiry.

Yours very truly

ATTORNEY GENERAL OF TEXAS

By /s/ W. V. Geppert
W. V. Geppert
Assistant

By /s/ David Wuntch
David Wuntch
Assistant

Approved: May 18, 1946

/s/ Carlos Ashley
First Assistant
Attorney General

WVG:ms:lh

This opinion considered and
approved in limited conference.

Supreme Court, U.S.
FILED
JAN 30 1987
[illegible]NIOL, JR.
CLERK

No. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER H. RANKIN, *et al.*,
Petitioners,

v.

ARDITH S. MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR RESPONDENT

BRUCE V. GRIFFITHS *
GREATER HOUSTON
AMERICAN CIVIL
LIBERTIES UNION
1236 West Gray
Houston, Texas 77019
(713) 524-6021

ALVIN J. BRONSTEIN
DAVID B. GOLDSTEIN
AMERICAN CIVIL
LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

LLOYD N. CUTLER
WILLIAM R. RICHARDSON, JR.
CARL R. JOHNSTON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ANNIE S. GARCY
GORDON QUAN &
ASSOCIATES, P.C.
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

* Counsel of Record

Counsel for Respondent

January 30, 1987

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Can a nonpolicymaking, nonconfidential county employee be constitutionally discharged for a private expression of her views on the policies of the President, where those views were wholly unrelated to office matters and were found to have had no disruptive effect upon the office, merely because her deplorable choice of words caused her superior to "los[e] confidence" in her?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	v
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
Procedural History	10
SUMMARY OF ARGUMENT	15
ARGUMENT	18
I. MS. McPHERSON'S PRIVATE CONVERSATION CRITICIZING GOVERNMENT POLICIES WAS AN EXPRESSION OF POLITICAL BELIEFS THAT WAS CLEARLY DIRECTED TO MATTERS OF PUBLIC CONCERN AND IS ENTITLED TO FIRST AMENDMENT PROTECTION	19
A. This Court Must Exercise Its Independent Judgment to Ascertain the Meaning and Significance of Ms. McPherson's Conversation	20
B. An Independent Examination of the Content, Form, and Context of Ms. McPherson's Statement Compels the Conclusion That It Was a Protected Form of Political Hyperbole	22
C. Whatever She Meant by Her Remark, Ms. McPherson's Conversation Was Protected Political Speech on a Matter of Public Concern	25

TABLE OF CONTENTS—Continued

Page

II. MS. McPHERSON'S INTEREST IN PRIVATELY EXPRESSING HER OBJECTIONS TO THE POLICIES OF THE FEDERAL GOVERNMENT CLEARLY OUTWEIGHS CONSTABLE RANKIN'S INTEREST IN HAVING "CONFIDENCE" IN HER 29

CONCLUSION 42

APPENDIX 1a

TABLE OF AUTHORITIES

Cases	Page
Abrams v. United States, 250 U.S. 616 (1919)	29
American Communications Association v. Douds, 339 U.S. 382 (1950)	40, 41
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	30
Arnett v. Kennedy, 416 U.S. 134 (1974)	35
Bachellar v. Maryland, 397 U.S. 564 (1970)	28
Baggett v. Bullitt, 377 U.S. 360 (1964)	34
Baumgartner v. United States, 322 U.S. 665 (1944)	28
Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 2278 (1986)	33
Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986)	25
Bond v. Floyd, 385 U.S. 116 (1966)	24, 34, 37
Brandenburg v. Ohio, 395 U.S. 444 (1969)	25, 28
Branti v. Finkel, 445 U.S. 507 (1980)	17, 35
Bridges v. California, 314 U.S. 252 (1941)	28
Brown v. Oklahoma, 408 U.S. 914 (1972)	26
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	26
Charnock's Case, 91 Eng. Rep. 533 (K.B. 1695-96)	39
City of Watseka v. Illinois Public Action Council, No. 86-631, slip op. (U.S. Jan. 20, 1987)	27
Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973)	36
Cohen v. California, 403 U.S. 15 (1971)	25, 28, 29
Cole v. Richardson, 405 U.S. 676 (1972)	34
Connick v. Myers, 461 U.S. 138 (1983)	*passim*
Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530 (1980)	36
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)	27
Elrod v. Burns, 427 U.S. 347 (1976)	17, 35
Frohwerk v. United States, 249 U.S. 204 (1919)	29
Garrison v. Louisiana, 379 U.S. 64 (1964)	27
Garrity v. New Jersey, 385 U.S. 493 (1967)	37

TABLE OF AUTHORITIES—Continued

	Page
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)	27
Goldman v. Weinberger, 106 S. Ct. 1310 (1986)	37
Gonzalez v. Benavides, 774 F.2d 1295 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1789 (1986)	33
Gooding v. Wilson, 405 U.S. 518 (1972)	26
Healy v. James, 408 U.S. 169 (1972)	30
Hess v. Indiana, 414 U.S. 105 (1973)	25
In re Primus, 436 U.S. 412 (1978)	27
Kelley v. Johnson, 425 U.S. 238 (1976)	37
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	30, 34
Miller v. California, 413 U.S. 15 (1973)	26
Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977)	31
NAACP v. Button, 371 U.S. 415 (1963)	36
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)	21, 25, 27, 28, 30
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	21, 22, 26, 30, 40
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978)	27
Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971)	30
Papish v. Board of Curators, 410 U.S. 667 (1973)	28, 30, 34
Pennekamp v. Florida, 328 U.S. 331 (1946)	14
Perry v. Sindermann, 408 U.S. 593 (1972)	30
Pickering v. Board of Education, 391 U.S. 563 (1968)	30, 31, 32
Pine's Case, 79 Eng. Rep. 703 (K.B. 1628)	39
Rosenfeld v. New Jersey, 408 U.S. 901 (1972)	26, 28
Schware v. Board of Bar Examiners, 353 U.S. 232 (1957)	36
Shelton v. Tucker, 364 U.S. 479 (1960)	34, 36
Speiser v. Randall, 357 U.S. 513 (1958)	30
Stanley v. Georgia, 394 U.S. 557 (1969)	39
Terminiello v. Chicago, 337 U.S. 1 (1949)	28

TABLE OF AUTHORITIES—Continued

	Page
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)	37
United States v. United States Gypsum Co., 333 U.S. 364 (1948)	14
Van Ooteghem v. Gray, 654 F.2d 304 (5th Cir. 1981) (en banc), *cert. denied*, 455 U.S. 909 (1982)	33
Walters v. National Association of Radiation Survivors, 105 S. Ct. 3180 (1985)	41
Waters v. Chaffin, 684 F.2d 833 (11th Cir. 1982)	33
Watts v. United States, 394 U.S. 705 (1969)	16, 22, 23, 25, 40
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943)	34
Wieman v. Updegraff, 344 U.S. 183 (1952)	30, 34, 39
Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984)	32
Constitutional Provisions	
Art. III, § 3	40
First Amendment	*passim*
Fourteenth Amendment	1, 2, 19, 41
Statutory Provisions	
5 U.S.C. § 7324(b)	36
18 U.S.C. § 871	22
42 U.S.C. § 1983	2
FED. R. CIV. P. 52(a)	14
Alien & Sedition Act, 1 Stat. 596 (1798)	39
TEX. REV. CIV. STAT. ANN. art. 6879a (Vernon 1960 & Supp. 1986)	3
Statute of Treason, 1350, 25 Edward 3, Stat. 5, ch. 2	39
Miscellaneous	
W. BLACKSTONE, COMMENTARIES	39
Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965)	27
Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES (1941)	39

TABLE OF AUTHORITIES—Continued

	Page
W. CROTTY, ASSASSINATIONS AND THE POLITICAL ORDER (1971)	38
M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (rev. ed. 1966)	40, 41
THE FEDERALIST (C. Rossiter ed. 1961)	40
Houston Chron. Apr. 3, 1981	9
J. F. KIRKHAM, S. G. LEVY, & W. J. CROTTY, ASSASSINATIONS AND POLITICAL VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969)	38, 39
A. MEIKLEJOHN, POLITICAL FREEDOM (1960)	27
S. OATES, LET THE TRUMPETS SOUND: THE LIFE OF MARTIN LUTHER KING, JR. (1982)	38
U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES (106th ed. 1986)	19
Wash. Post, May 16, 1972	38
Wash. Post, Mar. 31, 1981	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2068

WALTER H. RANKIN, *et al.*,
Petitioners,

v.

ARDITH S. MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; or deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This is an action brought by respondent Ardith S. McPherson against petitioners Walter H. Rankin and Harris County, Texas, pursuant to 42 U.S.C. § 1983. Ms. McPherson alleges that she was discharged from her position as an employee of Harris County by petitioner Rankin in violation of her rights secured by the First and Fourteenth Amendments. She seeks reinstatement, backpay, and other equitable relief (J.A. 9-16).

Petitioner Rankin is the elected Constable of one of eight precincts serving Harris County (J.A. 55-56). In Houston and substantially all of the remaining areas within Constable Rankin's precinct, municipal police departments—and not the constables' offices (J.A. 70)—are responsible for the day-to-day enforcement of the criminal laws (J.A. 56-57). Constable Rankin's office does not patrol the streets (J.A. 62). The major function of his office is to serve civil process in the Harris County courts, including juvenile and mental health proceedings (J.A. 60-61, 67-68). Over 80% of the office budget is devoted to these tasks (J.A. 62). The office also provides bailiffs for the local justice of the peace courts, which have civil jurisdiction and also jurisdiction to try misdemeanors

with a maximum fine of $200 (J.A. 63). In practice, such minor misdemeanors are generally tried in the local municipal court systems rather than in the justice of the peace courts (J.A. 65-66).

Constable Rankin employs 16 to 17 computer terminal operators (J.A. 73). Like all employees in the office, and pursuant to Texas law,[1] their official title is Deputy Constable (J.A. 38, 70).[2] They are not, however, required to be commissioned peace officers (J.A. 73-74). Their actual responsibilities consist of typing data recording the service of civil process into the memory of an office computer system (J.A. 79). The room in which they work is isolated from the general public (App. 25a),[3] and there is an "authorized employees only" sign on the door (Tr. 51; *see also* App. 4a, 25a). Constable Rankin enters this part of the office only twice a week (App. 27a).

Ms. McPherson is a black woman (App. 3a). She attended one year of college, studying secretarial science, and moved to Houston in July 1980 (App. 3a-4a). At that time, she was 19 years old (*see* Pl. Ex. 3A, J.A. 27, Tr. 8). She was unable to find a job until January 1981, when she began work as a clerk/typist in Constable Ran-

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[1] *See* TEX. REV. CIV. STAT. ANN. art. 6879a (Vernon 1960 & Supp. 1986).

[2] Ms. McPherson's certificate of deputation was apparently never executed by the county clerk (Pl. Ex. 1, R. 131, Tr. 8).

[3] The Joint Appendix does not include the trial testimony of Ms. McPherson or that of her coworker, Lawrence Jackson, both of which are part of the record before this Court. For the Court's convenience, we have reprinted that testimony as an appendix to this brief. References to this appendix are designated "App. ——." References to "R. ——" are to volume I of the record in this Court. References to testimony at the summary judgment hearing are designated "SJ Tr. ——"; this transcript is volume II of the record in this Court. References to testimony at trial not included in the appendix to this brief or the Joint Appendix are designated "Tr. ——"; this transcript is volume III of the record in this Court.

kin's office (App. 3a-4a). In applying for her job, she completed a one-page "application for, and contract of, employment." At the foot of this document was a preprinted "oath of office," stating that the applicant "will to the best of my ability preserve, protect and defend the Constitution and laws of the United States and this State." In completing her application, Ms. McPherson signed this oath (J.A. 27; App. 19a-20a).

Ms. McPherson was not a commissioned peace officer (J.A. 76-77) and was not permitted to carry a gun (App. 5a). The only test she took to qualify for her job was a typing test (App. 3a; J.A. 100; *see* Pl. Ex. 1, R. 133, Tr. 8). She received no law enforcement training, or any training other than two days of computer training (J.A. 76-77; App. 5a). Contrary to the suggestion of the United States as *amicus curiae* (U.S. Br. 2), she did not have a telephone on her desk, and never spoke with the public in the course of her job (App. 4a).[4] She was initially employed at the rate of $1,079 per month (Pl. Ex. 1, J.A. 27, Tr. 8). Effective March 1, 1981, her salary was increased to $1,208 per month (Pl. Ex. 1, J.A. 28, Tr. 8). At the time of her discharge, Ms. McPherson had two weeks remaining in her 90-day probationary period (J.A. 36).

On March 30, 1981, Ms. McPherson and the three other computer operators in the office were listening to the radio, as permitted by their employer (J.A. 79; App. 7a, 28a). Heidemarie Cornelison and Tina Richardson were taking their lunch break in the office (App. 6a). Ms. McPherson and Lawrence Jackson, who had become

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[4] Occasionally, an attorney visited Constable Rankin's office to ensure that service of process was recorded properly. While the record is unclear whether such attorneys ever entered the computer room in contravention of the sign (J.A. 78-79; App. 4a), Ms. McPherson herself never dealt with attorneys during these visits (App. 4a).

her boyfriend (App. 4a),[5] were entering data at their terminals, situated a few feet away from each other (App. 6a, 25a). While they were working, they heard an initial report on the radio that there had been an assassination attempt on President Reagan in Washington, D.C., but that he had escaped unharmed (App. 6a, 28a).[6] The people in the office were shocked by the news of the assassination attempt (App. 28a). The whole room went silent (SJ Tr. 14).

At some point before or during this news report, Captain John M. LeVrier entered the room (Tr. 51-53). Captain LeVrier did not supervise the computer operators (Tr. 50). His primary job was to deliver court papers from Constable Rankin's office to other precincts (Tr. 50). He began talking to Ms. Cornelison and Ms. Richardson (App. 7a). At one point, Ms. Cornelison also began discussing the attempted assassination with a friend on the telephone (SJ Tr. 39, Pl. Ex. 5, Tr. 8; Affidavit of Heidemarie Cornelison (Mar. 30, 1981), Pl. Ex. 2, R. 140, Tr. 8).

Ms. McPherson could not see Captain LeVrier, who was obscured by the dividers on the side of her desk and terminal (App. 30a). She had her head down, and thought that he had left the room (App. 7a).

In response to the news report, Ms. McPherson and Mr. Jackson began discussing who might have been responsible for the attempted assassination (App. 8a). Ms. McPherson and Mr. Jackson spoke only to each other, in what both considered to be a private conversation (App. 9a, 29a). Ms. Cornelison did not hear their con-

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[5] Ms. McPherson and Mr. Jackson were married on October 18, 1985, following the trial in this case.

[6] *See also* Pet. Br. 5 (report that President was "apparently uninjured"). This initial news bulletin was obviously in error. President Reagan had actually been seriously wounded by John W. Hinckley, Jr. *See* Wash. Post, Mar. 31, 1981, at A1, col. 1.

versation (App. 11a-12a; SJ Tr. 39, Pl. Ex. 5, Tr. 8; Affidavit of Heidemarie Cornelison (Mar. 30, 1981), Pl. Ex. 2, R. 140, Tr. 8). Nor, apparently, did Ms. Richardson (App. 6a-7a).[7]

Ms. McPherson initially observed that "I felt that that would happen sooner or later" (App. 8a). Mr. Jackson agreed (App. 8a). When asked at the trial what her next comment was, she responded:

> Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

(App. 8a). Mr. Jackson responded that the Reagan Administration had been reducing medicaid and food stamps assistance (App. 8a-9a, 28a). Ms. McPherson noted that the same had been true of welfare and CETA programs, and said to Mr. Jackson, "[S]hoot, if they go for him again, I hope they get him" (App. 8a; *see* App. 9a, 29a; Tr. 54).

Captain LeVrier overheard only Ms. McPherson's last remark (Tr. 55). He approached her and said, "Surely you don't mean that" (Tr. 56; *see* App. 10a). At that point, she looked up at him in surprise, because she thought that he had left the room (App. 10a, 30a). There is a dispute in the record as to how Ms. McPherson responded to Captain LeVrier's remark. She and Mr. Jackson testified that she said nothing (App. 10a, 30a).[8] Captain LeVrier testified that "she said, oh yes, I do [mean it]" (Tr. 56).

Ms. McPherson then resumed her duties (App. 10a). Captain LeVrier left and related Ms. McPherson's com-

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[7] Ms. Richardson was not a witness at either the summary judgment hearing or the trial.

[8] Ms. McPherson testified that she "just looked up at him and smiled" (App. 10a).

ment to his immediate superior, who immediately related it to Constable Rankin (Tr. 57). Constable Rankin then called Captain LeVrier into his office, and Captain LeVrier "told him exactly what I had heard her say" (Tr. 58). Constable Rankin did not ask him anything about the context of the remark, whether it was overheard by others, or to whom it was made (J.A. 82). Within five to ten minutes of her initial exchange with Captain LeVrier, Constable Rankin summoned her to his office (J.A. 82; Tr. 63). He also asked Captain LeVrier and Chief Deputy Constable Jack Abercia to join him (J.A. 82; Tr. 63).

Although Constable Rankin had interviewed Ms. McPherson when she had applied for a job (App. 3a), this was the first time since she had begun work that she had ever spoken to him in his office (App. 5a-6a). He directed her to sit down (App. 10a). He asked her if she had made the remark, and she admitted that she had (J.A. 82; App. 11a). Accounts of the next part of the conversation are disputed. Ms. McPherson testified that he then asked Captain LeVrier what he thought she had meant by the remark, and that LeVrier replied: "I don't think she meant anything by it. She just didn't know how it sound[ed] when she said it" (App. 11a). Constable Rankin testified, however, that he asked her, "do you mean it?" and that "she said, yes" (J.A. 82-83). Captain LeVrier agreed (Tr. 59). Chief Deputy Abercia did not recall such an exchange (Tr. 63).[9] Ms. McPherson was never asked at the trial whether she had said to Constable Rankin that she had meant her remark; at the summary judgment hearing, she testified

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[9] At the February 1983 summary judgment hearing, Chief Deputy Abercia testified that he was present during the questioning, and that "I don't recall" whether Constable Rankin asked her "if she meant that statement" (SJ Tr. 57-58). At the trial, some two years later, he again testified that he did not recall such an exchange, but that "about that time someone called me to the door" (Tr. 63).

that she told him, "Yes, but I didn't mean anything by it" (SJ Tr. 18).

According to Ms. McPherson's testimony, Constable Rankin said, "I just won't tolerate that in here. It's a public service office, and we for Reagan [sic], and some other stuff he was saying" (App. 11a).[10] He then got up, issued instructions to have her fired immediately, and left the room (J.A. 86; Tr. 59, 64; App. 11a). He did so without asking or knowing to whom or in what context she had initially made the remark (J.A. 82), and solely based "on what was made to me direct":

> I was not conc[e]rned who she had made it to, because she had made it to me, and when she made the remark to me, then I lost all confidence at all that I could ever be comfortable in a law enforcement office and agency . . . .

(J.A. 83. *See also* J.A. 92 ("I have to be comfortable with the people I work with"), 101, 103). He had no knowledge of whether the remark had disrupted any work in the office (J.A. 84-85), and did not care one way or the other:

> I did not base my action on whether the work was interrupted or not. I based my action on a statement that was made to me direct.

(J.A. 86). In fact, the conversation between Ms. McPherson and Mr. Jackson caused no impact on the work of the other employees in the office (J.A. 85-86). As noted above, Ms. Cornelison (and apparently Ms. Richardson) never heard it. Indeed, even Mr. Jackson had made nothing of his conversation with Ms. McPherson; he testified that he was "shocked" to learn that she had been fired over a remark that he had nearly forgotten (App. 31a).

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[10] *See also* SJ Tr. 18 ("And he said, 'we are for Reagan and we support Reagan' ").

Constable Rankin appeared on a television news program the night he fired Ms. McPherson (App. 13a). He also called the United States Secret Service that day, and recommended that they investigate Ms. McPherson (J.A. 84).

On the following day, Ms. McPherson came to the office and requested an interview with Constable Rankin, because "I wanted to explain myself" (App. 12a; *see also* J.A. 84). He refused to see her, because "I didn't have anything else to discuss with her" (J.A. 84). On the day after Ms. McPherson was fired, television reporters sought to interview her, but she declined to appear on television (App. 13a). Two days later, newspaper reporters interviewed her (App. 12a-13a). She admitted to them that she had made the statement at issue (Houston Chron., Apr. 3, 1981, § 1, at 4, col. 1, Pl. Ex. 9, Tr. 8; *see* R. 1c).[11] The local newspaper quoted her as saying:

> I was talking to someone about Reagan's (proposed) cutbacks (in some social and welfare services)—how it was going to affect the poor people. I was getting angrier and angrier . . . . I wasn't serious about killing Reagan. I don't wish death on anyone.

(*Id.*). On the same day that the newspaper called Ms. McPherson, the Secret Service interviewed her. After the interview, they told her that "they were sorry," that "they knew it was a prank call," but that "they just have to come out and investigate" (App. 13a-14a).[12]

After Ms. McPherson was fired, she was unable to find another job until July 1981, when she obtained employ-

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[11] Constable Rankin was also interviewed (Houston Chron., Apr. 3, 1981, § 1, at 4, col. 1, Pl. Ex. 9, Tr. 8; *see* R. 1c).

[12] Ms. McPherson was never prosecuted by the United States Department of Justice, or by any other law enforcement authority. The United States concedes in its brief as *amicus curiae* that "we do not think that [her] remark could [constitutionally] be criminalized" (U.S. Br. 8).

ment at a local shoe store (App. 16a). She was laid off in January 1983, and received unemployment compensation at the rate of $94 a week (App. 16a). At the time of the trial in January 1985, she was working for a temporary secretarial agency (App. 17a).

Procedural History

Ms. McPherson filed her complaint in June 1981.[13] At the close of a hearing on cross-motions for summary judgment, the district court ruled from the bench in favor of the defendants (SJ Tr. 73-74).

Two months later, the district court issued findings of fact and conclusions of law (J.A. 35). These findings did not include any reference to any security work by Harris County constables. The court found that Ms. McPherson's comment "did not disrupt the workplace in general" (J.A. 42). However, "regardless of the seriousness of [her] intent," the court found that her statement overheard by Captain LeVrier "indicated to her superiors that she did not appreciate or possess the sensitivity and discretion required of a public employee" (J.A. 39). It further found that Constable Rankin "sincerely and earnestly believes" that one with Ms. McPherson's attitude "is not a suitable employee of a law enforcement agency" (J.A. 39). It concluded that the comment "in no way served the public's interest in matters of general concern" (J.A. 42), and that Constable Rankin "maintains a strong interest in retaining only those deputies who possess and publicly manif[e]st qualities of character that accentuate the high standards of the field of law enforcement" (J.A. 43). Accordingly, the district court held that Ms. McPherson's First Amendment rights were not violated by her discharge (J.A. 43).

The Fifth Circuit vacated and remanded for a full trial on the merits (J.A. 44). It noted the clear factual

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[13] There has never been a state court proceeding involving Ms. McPherson's discharge.

dispute as to whether Ms. McPherson had meant "what she said" (J.A. 48-49, 51). Applying this Court's intervening decision in *Connick v. Myers*, 461 U.S. 138 (1983), the Fifth Circuit concluded that there was a genuine issue of material fact concerning the content, form, and context of Ms. McPherson's speech, and thus that summary judgment had been inappropriate (J.A. 49-50).

On remand, the parties agreed that a critical but disputed factual question was the meaning in context of Ms. McPherson's final remark (Tr. 4-8). As the district court observed:

> I suppose I took the position at the hearing that it really didn't make any difference what her intent was. I think that's where the Fifth Circuit finds me at fault. I took the position that she was working in a public position for a public official, and what she said was grounds for discharge, regardless of the content and circumstances.

(Tr. 7). At the one-day trial, as noted above, the parties provided conflicting testimony as to what Ms. McPherson told Captain LeVrier and Constable Rankin about the meaning of her remark. Ms. McPherson also testified that she did not hope and had not hoped that someone would actually kill the President (App. 9a). She explained that her remark was "just the end of the conversation . . . . It doesn't mean that I want the man dead" (App. 9a; *see also* App. 23a). At the conclusion of her cross-examination, the district court pointedly asked her:

> Q And you just meant to say that you were unhappy with President Reagan?
>
> A Right. I just disagreed with his policy.

(App. 23a).

At the conclusion of the trial, the district court again ruled from the bench (J.A. 116-21). The court found

that "by words or deeds, [Ms. McPherson] conceded having said those words to [Captain LeVrier and Constable Rankin], and made no attempt to retract them" (J.A. 117). Despite the Fifth Circuit's mandate, the court observed that "I'm not sure that the real question in this case is what [Ms. McPherson] meant" (J.A. 117). It concluded that Constable Rankin was entitled to "judge [her] words by their ordinary English context" (J.A. 118). It rejected Ms. McPherson's trial testimony as to what she had meant, but its findings as to what she *did* mean were vague and imprecise:

> I don't believe she meant nothing, as she said here today, and I don't believe that those words were mere political hyperbole. They were something more than political hyperbole. They expressed such dislike of a high public governmental official as to be violent words, in context. This is not the situation where one makes an idle threat to kill someone for not picking them up on time, or not picking up their clothes. It was more than that.

(J.A. 119).

The district court then held that Constable Rankin was entitled to be "very concerned about the character and trustworthiness of the people in his office" (J.A. 119). In this second decision, the court found the constable's alleged concerns about security matters to be "far less significant in his motivation" (J.A. 119).[14] In the court's view, the concluding remark indicated to Constable Rankin that the speaker "was the kind of person who would be a bad employee, would be a negative influence in the office" (J.A. 119-20). The district court concluded that "I do not believe that that is protected speech," and entered judgment for the defendants (J.A. 120, 122).

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[14] The court had warned counsel for petitioners, "I hope you are not going to stress too much her position as a quasi-secret service agent" (J.A. 112).

The Fifth Circuit reversed a second time, once again based upon this Court's opinion in *Connick*.[15] It held that the threshold question was whether Ms. McPherson's remarks addressed "matters of public concern" (J.A. 128-29). In analyzing this question, it recognized that a public employee could not constitutionally be fired merely for criticizing President Reagan's social and economic policies; the difficulty, it observed, is that in this case Ms. McPherson "chose such a repulsive, nigh obscene, manner of making her criticism" (J.A. 129). The Fifth Circuit nevertheless concluded that Ms. McPherson's remarks, including the offensive one, dealt with "matters of public concern" under the *Connick* rule (J.A. 130, 133-34). It then proceeded to a balancing of First Amendment and governmental interests.

Contrary to the suggestion of the United States as *amicus curiae* (U.S. Br. 23 n.2), the Fifth Circuit found that Constable Rankin's precinct "has no direct law enforcement role" (J.A. 130). And in doing so, it relied explicitly on the fact that "the district judge did not regard . . . as a serious suggestion" Constable Rankin's unexplained "hint[] that his office might somehow participate in providing security during presidential visits to Houston" (J.A. 131). *See* note 14 *supra*. The court also found that Ms. McPherson herself "played an entirely clerical role" (J.A. 131).

The Fifth Circuit recognized "our duty to make 'an independent constitutional judgment on the facts of the case' " (J.A. 132 (quoting *Connick*, 461 U.S. at 150 n.10)), and to " 'examine for ourselves the statements in issue and the circumstances under which they were made to see whether or not they . . . are of a character

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[15] The Fifth Circuit's opinion was initially filed on March 19, 1986 (J.A. 123). On April 16, 1986, the court *sua sponte* amended its opinion, adding footnote 2. Memorandum to Counsel from Office of the Clerk, United States Court of Appeals, Fifth Circuit, Apr. 16, 1986.

which the principles of the First Amendment . . . protect' " (J.A. 132 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)). In attempting to reconcile this independent obligation with the "clearly erroneous" standard of FED. R. CIV. P. 52(a), the Fifth Circuit concluded that "when a factual dispute centers not on what was said but on its context, the deference due a trial court's findings becomes less certain" (J.A. 133). Ultimately, however, the court appeared to apply the clearly erroneous standard, at least *arguendo*. It accepted what it characterized as the district court's conclusion "that McPherson actually hoped that the President would be assassinated" (J.A. 132). It said that the district court's inference, drawn from "the inevitably ambiguous response to the question, 'Did you mean it?' ", was based upon "a slender but adequate reed." Accordingly, it concluded, "we are not left with the firm belief that a mistake was made" (J.A. 133).[16] Apparently, however, it accepted this inference only *arguendo*, because it then decided that:

> Whether her statement was an hyperbolic expression of unhappiness with the President's policies, or an actual wish for his assassination, it was evoked by and addressed to serious matters of public concern.

(J.A. 134).

Next, following the *Connick* rule, the court balanced Ms. McPherson's right to express her beliefs on a matter of public concern, "however loathsome," against Constable Rankin's "important and legitimate government interest" in employing "only those individuals who have no serious reservations about the fundamental mission of the

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[16] Although the Fifth Circuit did not so state, this conclusion was a paraphrase of this Court's articulation of the "clearly erroneous" standard. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

agency" (J.A. 134-35). It emphasized the absence of any disruption caused by Ms. McPherson's private conversation, or any evidence that her remark "threatened the future efficiency or morale of the office" (J.A. 134). Because her duties "were so utterly ministerial and her potential for undermining the office's mission so trivial," it held that she could not "constitutionally be fired for her expression of political opinion":

> The ideal of tolerance is sometimes sorely taxed in practice—when that happens, there is all the more reason to recall its long-term benefits. However ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office.

(J.A. 136). The Fifth Circuit reversed, and remanded the case "for determination of an appropriate remedy" (J.A. 136). This Court then granted certiorari.

SUMMARY OF ARGUMENT

This is a hard case, because of our adverse reaction to anyone who carries disapproval of a public official's policies to the point of such a distasteful remark as Ms. McPherson's. But it is a paradigm of the maxim that hard cases can make bad law. To uphold this state sanction against her private expression on a matter of public concern would open the door to an Orwellian police power over the political views of all public employees, who comprise 15% of the nation's work force.

While Ms. McPherson's remark was deplorable, we defend her constitutional right to make it in the context of the other thoughts she expressed under the stress of the moment. This Court has never upheld a state sanction against a "nonpolicymaking, nonconfidential" public employee for the private expression of a political view that was not unlawfully obscene, libelous, or otherwise illegal, and that did not harm office efficiency, morale, or discipline. It should not do so now.

I

The Court has acknowledged its duty, when reviewing a claimed abridgment of First Amendment rights, to make its own independent review of the facts, including the content, form, and context of the speech the state would punish. Such an examination shows that Ms. McPherson's initial reaction to the shocking news of the assassination attempt was to infer that it must have been done by a black person because of Administration policies she regarded as harmful to most of "my kind." She expressed these thoughts privately to the black employee at the adjacent work station, who agreed with her criticism. She conveyed the depth of her disapproval of these policies by stating to him: "If they go for him again, I hope they get him." This was pure political hyperbole, somewhat milder than the remark this Court found immune from prosecution in *Watts v. United States*, 394 U.S. 705, 706 (1969) (per curiam), where an anti-Vietnam protester said, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."

Ms. McPherson's final remark, but not the preceding statements that formed the relevant context, was overheard by a higher ranking employee of whose presence Ms. McPherson was not aware. He reported it to the constable, who summoned Ms. McPherson to confirm to him whether she had made the remark and whether she meant it. The testimony as to her reply is conflicting, but the District Court found that "by word or deeds, she conceded having said those words to them and made no attempt to retract them" (J.A. 117). When she tried to see the constable the next day to explain she had not meant the remark, he refused to see her.

On these "constitutional facts," Ms. McPherson's remarks, including the final one, were clearly addressed to her disapproval of the Administration's policies—a matter of obvious public concern—and are clearly protected. They fall well outside the categories of speech to

which this Court has denied protection, such as obscenity, certain types of libel, "fighting words," and unlawful threats to harm the President. Despite the deplorable nature of the concluding comment, the remarks taken as a whole lie well within the First Amendment's core values. As this Court has long recognized, the offensive nature of political speech does not deprive it of First Amendment protection.

II

As the parties to this case all agree, it is not a condition of public employment that one waive his constitutional rights. Moreover, under this Court's rulings in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), nonconfidential, nonpolicymaking public employees cannot be fired merely for their political views.

Under *Connick v. Myers*, 461 U.S. 138 (1983), protected speech of a public employee on a matter of public concern may be balanced against the government's interest in the efficiency of the public service and in employee morale and discipline. While these governmental values may sometimes outweigh an employee's interest in uttering protected speech, they can only do so when the speech impairs efficiency, morale, or discipline. Unless such an impairment can be shown, they cannot outweigh private remarks to a single fellow employee that express protected political views on a matter of public concern. As the court of appeals found, the constable "specifically denied having fired [Ms. McPherson] because of any disruption caused by her comment, and the evidence did not show that the remark threatened the future efficiency or morale of the office" (J.A. 125).

Constable Rankin and the United States argue that a law enforcement office can dismiss an employee who expresses sympathy with the commission of any unlawful act, and that Ms. McPherson did so here. At most, Ms. McPherson was emphasizing how out of sympathy she

was with the President's policies, rather than expressing a sympathy for lawbreaking as such. Such remarks are not unusual in the emotional shock that follows an unlawful act of violence against a controversial public figure. Similar outbursts occurred immediately after the attempts on the lives of Governor George Wallace and Dr. Martin Luther King, Jr. Many public employees, including employees of law enforcement agencies, were probably among those making such remarks. Such reactions may well be deplorable, but they bear no reasonable relationship to a public employee's fitness for a nonpolicymaking, nonconfidential position. They create no governmental interest outweighing the First Amendment rights of such employees.

These examples cannot be separated in principle from the facts of this hard case. This Court should not permit the dismissal of a nonpolicymaking, nonconfidential employee for a deplorable private remark made in a moment of shock on a matter of public concern, but without any effect on the efficiency, morale, or discipline of her office.

ARGUMENT

The hyperbole involved in this case is not confined to Ms. McPherson's deplorable remark. The brief of the United States as *amicus curiae* contains considerable hyperbole of its own. It mischaracterizes the record and findings of two lower courts here as a case involving "unflinching approval of and unabashed desire for the assassination of the President" (U.S. Br. 7, 9, 11) by one who "openly" and "stubbornly" expressed her political opinion (U.S. Br. 8, 9, 11, 20), "refuse[d] to retract" it, and "reiterated it in a closed-door discussion" with her superior (U.S. Br. 8, 18), in which she "dug in her heels" and "insisted" that she meant what she said (U.S. Br. 24). It describes this as conduct "verging on insubordination" (U.S. Br. 24) that was "not more than one step removed from . . . fighting words" (U.S. Br.

17) and that ultimately threatened the public "appearance" and "reputation" of her employer (U.S. Br. 21, 22-23, 24, 26), a police agency that "depends on the public for tips about criminal activity" (U.S. Br. 23).

Stripped of this hyperbole, the actual record before this Court shows a far different case. Ms. McPherson's remark was made at the time of a shocking event, in a purely private conversation with a close personal friend, and was one that she has testified and demonstrated was never meant literally. While the remark was deplorable, she had a constitutional right to be free of sanctions for making it at the time and place and in the context of its utterance. Taken in context, it was an utterly harmless expression of her deeply felt political beliefs concerning Administration policies directly affecting "most of my kind." To rule that the First and Fourteenth Amendments do not protect an isolated emotional expression of her political thoughts in a moment of great stress would open the door to government sanctions against public employees (who comprise 15% of the national work force[17]) over a boundless range of private expressions of their political beliefs.

I. MS. McPHERSON'S PRIVATE CONVERSATION CRITICIZING GOVERNMENT POLICIES WAS AN EXPRESSION OF POLITICAL BELIEFS THAT WAS CLEARLY DIRECTED TO MATTERS OF PUBLIC CONCERN AND IS ENTITLED TO FIRST AMENDMENT PROTECTION.

In this case, the Fifth Circuit found Ms. McPherson's speech to be "evoked by and addressed to serious matters of public concern," whether it was a "hyperbolic expres-

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[17] U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 294, 393 (106th ed. 1986) (1984 data). Even criminal justice employees (police, courts and correction) number more than one million. *Id.* at 403 (1982 data). While no precise figures are available, it seems likely that the number of public employees engaged in all types of law enforcement (criminal, civil, and administrative) is of the order of five million.

sion of unhappiness with the President's policies, or an actual wish for his assassination" (J.A. 133-34). The United States disagrees. It wrongly asserts that Ms. McPherson's statement—"if they go for him again, I hope they get him"—was "separate from and no part of her expression of 'disapproval of the President's policies,'" simply because that statement alone was later reported out of context to Constable Rankin and then acknowledged by Ms. McPherson (U.S. Br. 18). It then argues that "expression favoring the President's assassination" does not relate to "a matter of public concern" (U.S. Br. 15-19).

This argument would make a virtue of Constable Rankin's failure to learn the context of Ms. McPherson's remark and his refusal to see her when she returned the next day to explain it. *See* pages 7-9 *supra*. In fact, when placed in its actual context, as this Court's decisions require, and as Ms. McPherson testified at trial, her remark was at worst a highly regrettable form of hyperbole, uttered at the conclusion of a conversation in a moment of unusual stress to illustrate how strongly she disagreed with policies of the federal government that directly affected "most of my kind" (App. 8a). But even if it were "something more," as the district court broadly and imprecisely suggested, it was part of a private expression of views on a matter of public concern that is protected by the First Amendment.

A. This Court Must Exercise Its Independent Judgment to Ascertain the Meaning and Significance of Ms. McPherson's Conversation.

This Court has made clear that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In its

first hearing, held before *Connick* was decided, the district court granted summary judgment without considering the context in which Ms. McPherson made her statement, and without determining her intent or meaning. The Fifth Circuit reversed, citing *Connick* (J.A. 48-49).

Despite a specific mandate from the court of appeals (J.A. 52), on remand the district court essentially avoided answering the question of what Ms. McPherson had meant by her remark—even though the court had expressly asked her that question at trial (App. 23a). While the district court did conclude that her statement was "something more than political hyperbole" (J.A. 119), it did not determine what that something more actually was. The best the Fifth Circuit could make out of this murky finding was that the district court was "*apparently* persuaded that [Ms. McPherson] was fired because she honestly hoped that any future assassination attempt would be successful" (J.A. at 130 (emphasis added)). It said, apparently *arguendo*, that under the clearly erroneous standard and on the basis of "a slender but adequate reed," such a finding would not be clearly erroneous (J.A. 133), but it decided the case on a ground that made it unnecessary to make an independent examination of its own (*see* pages 13-15, *supra*).

We respectfully submit that this Court should, as a threshold matter, make the findings of constitutional fact that the two courts below declined to make concerning the content, form, and context of Ms. McPherson's remark. As the Court has long recognized, its "duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915 n.50 (1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)). In First Amendment cases, the Court has said it will "examine for ourselves the statements in issue and the circumstances under which they were made" to see whether the

statements are constitutionally protected. *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). In *Connick*, the Court conducted just such an examination to determine whether a public employee's speech, in the light of its content, form, and context, did or did not relate to a matter of public concern. *See* 461 U.S. at 150 & n.10. In our submission, a comparable examination should be made here, and would show that Ms. McPherson's conversation—including her highly regrettable concluding remark—was clearly related to matters of public concern and entitled to protection.

B. An Independent Examination of the Content, Form, and Context of Ms. McPherson's Statement Compels the Conclusion That It Was a Protected Form of Political Hyperbole.

Ms. McPherson's challenged statement is milder than that involved in *Watts v. United States*, 394 U.S. 705 (1969) (per curiam). Watts took part in a rally on the Washington Monument grounds protesting American involvement in the Vietnam War. He referred to his upcoming physical examination for the draft and then stated, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. This Court reversed Watts' conviction under 18 U.S.C. § 871 for threatening the life of the President. Interpreting that statute against the "background" of the First Amendment's protection of political speech, the Court concluded:

> We agree with petitioner that his only offense here was "a kind of very crude offensive method of stating a political opposition to the President." Taken in context, and regarding the expressly conditional nature of the statement and the reaction of the listeners, we do not see how it could be interpreted otherwise.

Id. at 708.

This conclusion is equally applicable here. Ms. McPherson's statement, like that in *Watts*, was not meant literally. As she testified, "It doesn't mean that I want the man dead" (App. 9a). The "content, form, and context, . . . as revealed by the whole record,"[18] demonstrate that she intended her statement only to illustrate how strongly she "disagreed with [the President's] policy" (App. 23a). Contrary to the suggestion of the United States, it was part and parcel of a discussion of those policies of the Reagan Administration and their effect on "most of my kind" (App. 8a). Ms. McPherson testified similarly at the summary judgment hearing that "I was angry because I felt like maybe one day I might be one needing [public assistance or welfare]" (SJ Tr. 16). In fact, she ultimately did need to depend on unemployment assistance for a short time (App. 16a). Her snap remark cannot be wrenched from its political context simply because Constable Rankin was unaware of that context when he fired her.

Constable Rankin and Captain LeVrier testified that Ms. McPherson told them that she "meant" her final remark (J.A. 82-83; Tr. 59). Deputy Chief Abercia, however, could recall no such statement by her.[19] Ms. McPherson and Mr. Jackson (the only person to whom she was speaking and the only person who heard the entire conversation in full context) testified that she did not mean it (App. 9a, 11a, 29a). It is clear from the district court's two opinions in this case that it was unwilling to accord any probative value to the testimony of Constable Rankin and Captain LeVrier on the point. The court never found that she said that she meant the remark, and never found what she did mean by it, except that it was "something more" than hyperbole (J.A. 119).

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[18] *Connick*, 461 U.S. at 147-48.

[19] *See* page 7 & n.9 *supra*.

In any event, as the Fifth Circuit recognized, there would be little significance to any "inevitabl[e] ambiguous response" to the question, "Did you mean it?" (J.A. 133). Whatever she said about her remark in the period of stress during and immediately after the time she made it, Ms. McPherson squarely answered the district court's question at trial by testifying that her statement to Mr. Jackson was meant only to convey to him the intensity of her political views: "I just disagreed with [President Reagan's] policy" (App. 23a). Ms. McPherson's actions on the day after her firing clearly corroborate this testimony. She returned to Constable Rankin's office three times that day to explain to him that she had not meant any harm toward the President. She waited there for several hours, and did not give up until finally being told that he did not intend to see her (App. 12a; J.A. 84). This subsequent conduct and testimony is entitled to great weight in assessing the intention of the speaker for First Amendment purposes. In *Bond v. Floyd*, 385 U.S. 116, 133-34 (1966), this Court relied upon very similar supplementary statements as a "clarification" that expressions of sympathy for law violators—in that case, draft evaders—did not constitute an incitement to lawbreaking justifying exclusion from a state legislature.

Petitioner's strained arguments about Ms. McPherson's regrettable remark ignore reality, and are inconsistent with *Connick*. Ms. McPherson's statement was made moments after hearing the first radio report that there had been an attempted assassination of the President. News of such a shocking and tragic event deeply affects all people throughout the country, whatever their political views. It inevitably caused a strong emotional reaction in everyone who heard the news; as Ms. McPherson testified, "the whole room went silent." *See* page 5 *supra*. Ms. McPherson's statement was made while she was still under the emotional shock of hearing the news. A parallel shock impact was apparent in Constable Rankin's re-

sponse. Under the stress of the moment, he became so angry that he fired her without understanding the context of her remark, and without giving her an adequate chance to explain herself, even on the following day.[20]

C. Whatever She Meant by Her Remark, Ms. McPherson's Conversation Was Protected Political Speech on a Matter of Public Concern.

Even if Ms. McPherson could be found to have meant her statement literally, such a hope for the President's death, in the context in which it was made, was clearly protected speech on a matter of public concern. It was certainly not "advocacy" of assassination (U.S. Br. 15, 19, 20), much less incitement to imminent lawless action (J.A. 49 n.5).[21] As this Court noted about the remark in *Watts*,[22] her remark was conditional; she began by saying, "*If* they go for him again . . ." (J.A. 117 (emphasis added)). Its intended recipient, Mr. Jackson, was certainly unmoved to engage in unlawful action; indeed, he thought nothing of the remark and was shocked at her discharge because of it (App. 31a). The abstract expression of a hope that "they" might be successful in the future is deplorable, but it cannot be characterized as advocacy or incitement of "them" to assassination.[23]

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[20] This draconian response itself raises substantial First Amendment concerns. *See Bethel School Dist. No. 403 v. Fraser*, 106 S. Ct. 3159, 3171-72 (1986) (Stevens, J., dissenting). *See also Cohen v. California*, 403 U.S. 15, 19 (1971) (absence of notice that speech would not be tolerated in certain places).

[21] *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[22] *See* 394 U.S. at 708 (relying on "the expressly conditional nature of the statement").

[23] *Cf. Hess v. Indiana*, 414 U.S. 105, 108 (1973), in which this Court reversed a conviction for a statement which "at worst, . . . amounted to nothing more than advocacy of illegal action at some indefinite future time." Here, Ms. McPherson did not advocate that Mr. Jackson do anything at any time.

At worst, it was only an expression that she disagreed with the policies of the President and that, at the moment she heard the shocking news of the attempt, she hoped that harm would befall the President in the event that another attempt occurred. She did not say she would make such an attempt herself, as Watts had in the statement this Court held to be mere hyperbole in that case.

Of course, as the United States points out, certain other narrowly limited types of speech have been held not entitled to First Amendment protection. These include "fighting words" which "by their very utterance . . . tend to incite an immediate breach of the peace," [24] certain forms of libelous speech,[25] and obscenity.[26] But Ms. McPherson's expression of political views—including her final remark—was far removed from any of these categories of speech.[27] And it was not a "willful use of scurrilous language calculated to offend [Mr. Jackson's] sensibilities." [28]

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[24] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). *But see Gooding v. Wilson*, 405 U.S. 518 (1972).

[25] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[26] *Miller v. California*, 413 U.S. 15 (1973).

[27] The United States describes Ms. McPherson's statement as "not more than one step removed from . . . fighting words" (U.S. Br. 17). Whatever this characterization means, Ms. McPherson did not direct an "offensive and divisive statement" at an intended listener, as in *Chaplinsky*. Her only intended listener, Mr. Jackson, did not disagree with her political views (App. 8a, 28a-29a). Constable Rankin heard her acknowledge her remark only because it was reported to him out of context and because he demanded that she do so (J.A. 80-83).

[28] *Rosenfeld v. New Jersey*, 408 U.S. 901, 905 (1972) (Powell, J., dissenting). *Cf. Brown v. Oklahoma*, 408 U.S. 914 (1972) (Powell, J., concurring in the result), in which offensive language similar to that in *Rosenfeld* was used "in a political meeting to which appellant had been invited," in a context in which the language "might have been anticipated by the audience."

Nor was Ms. McPherson's expression of her opposition to the President's policies one that "occupies at best a 'subordinate position in the scale of First Amendment values'" (U.S. Br. 19 (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978))). It was not solicitation of accident victims by a member of the Texas bar (U.S. Br. 19 (citing *Ohralik*)).[29] And it was not misinformation about anyone's financial assets and liabilities (U.S. Br. 14-16, 18 (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985))). It was a conversation about the political, social, and economic policies of a national Administration, in a private conversation between two close personal friends who believed their "kind" to be profoundly aggrieved by those policies. As this Court has held, such "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Ms. McPherson's statements need not "creep into that highest echelon of the First Amendment hierarchy" (U.S. Br. 25), because they already reside there.[30]

Contrary to the further suggestions of the United States (U.S. Br. 18), Ms. McPherson was not required to shout her political views from a rooftop to entitle her to the protections of the First Amendment. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414-16 (1979). The political views held by citizens of this country are undoubtedly expressed more often and more

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[29] *Cf. In re Primus*, 436 U.S. 412, 414 (1978) (setting aside disciplinary action for legal solicitation "seeking to further political and ideological goals").

[30] *Claiborne Hardware Co.*, 458 U.S. at 913; *see* A. MEIKLEJOHN, POLITICAL FREEDOM 27 (1960); Brennan, *The Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 11-13 (1965); *see also City of Watseka v. Illinois Public Action Council*, No. 86-631, slip op. (U.S. Jan. 20, 1987), *aff'g* 796 F.2d 1547 (7th Cir. 1986) (regulation of time, place, and manner of political speech requires significant relationship to the government interest and inadequacy of less restrictive alternatives).

freely in private conversations than in public speeches. Permitting the state to impose sanctions on political views whenever expressed privately would be Orwellian indeed.

As the Fifth Circuit recognized, the only distinguishing feature of Ms. McPherson's expression of her political convictions in this case was its "repulsive" reference to a possible future attack by others on the President (J.A. 129). But the mere fact that Ms. McPherson expressed her political views in a way that is offensive to most of us cannot deprive those views of First Amendment protection. *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *Papish v. Board of Curators*, 410 U.S. 667, 668 n.3 (1973) (per curiam). As this Court has unanimously held, "[s]trong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases." [31]

At bottom, this case involves none of the claimed potential incitement, provocation, breach of the peace, or other disruptions which this Court has had to weigh in its prior decisions providing protection to offensive public speech.[32] It involves nothing more than a tasteless private remark made to a close personal friend who was himself not offended by it. The First Amendment extends the freedom "to speak foolishly and without moderation," [33] even for remarks lacking "perfect good taste." [34] For as Justice Harlan observed, and as this case perfectly demonstrates, the government "can[not] forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California*, 403

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[31] *Claiborne Hardware*, 458 U.S. at 928 (boycott leader's reference to "break[ing] . . . necks" of nonparticipants).

[32] *See Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

[33] *Baumgartner v. United States*, 322 U.S. 665, 674 (1944).

[34] *See Bridges v. California*, 314 U.S. 252, 270 (1941).

U.S. 15, 26 (1971).[35] The First Amendment was designed to bar the government from being a censor of public discourse, thereby "putting the decision as to what views shall be voiced largely into the hands of each of us. . . ." Any contrary approach would ignore "the premise of individual dignity and choice upon which our political system rests." *Id.* at 24.

The hyperbolic rhetoric of petitioners and the United States concerning Ms. McPherson's conversation ignores *Connick*'s insistence upon an examination of the "content, form, and context" of speech. It would also return this Court to the long discredited view that "a little breath" of offensive speech might be "enough to kindle a flame" of lawlessness. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919), *cited at* U.S. Br. 16. By permitting Constable Rankin to fire Ms. McPherson based solely on the "ordinary English context" of one remark divorced from the rest of its true context (J.A. 118), the district court in this case made the same error.

II. MS. McPHERSON'S INTEREST IN PRIVATELY EXPRESSING HER OBJECTIONS TO THE POLICIES OF THE FEDERAL GOVERNMENT CLEARLY OUTWEIGHS CONSTABLE RANKIN'S INTEREST IN HAVING "CONFIDENCE" IN HER.

Perhaps to circumvent the clear authority of this Court's prior decisions, the United States next argues that while the First Amendment protects Ms. McPher-

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[35] *See also Abrams v. United States*, 250 U.S. 616, 629 (1919) (Holmes, J., dissenting):

> In this case sentences of twenty years imprisonment have been imposed for the publishing of two leaflets that I believe the defendants had as much right to publish as the Government has to publish the Constitution of the United States now vainly invoked by them. Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; . . . the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow . . . .

son's remark from "criminalization" (U.S. Br. 8, 18), it does not protect it against other state sanctions. But the First Amendment applies to all state sanctions against protected freedoms. It forbids injunctions,[36] civil damage judgments,[37] withholding of governmental benefits,[38] and, in the case of public employees, dismissal from the public service—except in the rare case, such as *Connick*, where the government as employer can show a superior interest in the efficient performance of its government functions.

Indeed, it has now long been settled that governments may not condition public employment on a ground that infringes on the constitutional rights of its employees. *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952).[39] *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), create a narrow qualification to this fundamental principle in the context of the right of free expression of public employees. Those decisions require a balancing of "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency

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[36] *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

[37] *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[38] *See, e.g., Healy v. James*, 408 U.S. 169 (1972) (denial of official recognition of campus organization); *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam) (expulsion from university for distributing newspaper found to violate "conventions of decency"); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (revocation of passports of Communist party leaders); *Speiser v. Randall*, 357 U.S. 513 (1958) (limitation of property tax exemptions for veterans).

[39] This doctrine applies to probationary employees such as Ms. McPherson. *Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972).

of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.[40]

In *Pickering*, the Court invalidated a teacher's dismissal for publishing a letter in a local newspaper criticizing the manner in which the board of education had handled past proposals to raise revenue. It found that the letter was not directed towards anyone with whom the employee had day-to-day contact and that in fact it was totally ignored by everyone except for the members of the board of education. *Id.* at 569, 570. The question of maintaining discipline and harmony in the workplace therefore did not arise. *Id.* at 570. On the other side of the balance, the Court found the school system's financial problems to be a "matter of legitimate public concern," *id.* at 571, on which "free and open debate is vital to informed decision-making by the electorate," *id.* at 571-72. The Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." *Id.* at 573.

By contrast, in *Connick*, an employee about to be involuntarily transferred to another department distributed a questionnaire at work soliciting the views of her fellow workers on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. She was terminated for creating a "mini-insurrection" in the office, *id.* at 141, 151, and this Court upheld her termination. Because the last of these questions addressed a matter of

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[40] *See also Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (defendant may show that it would have reached same decision to discipline employee in absence of protected speech). In this case, petitioners concede that Ms. McPherson was fired solely because of the content of her speech (Pet. Br. 5-6). Constable Rankin so testified (J.A. 86).

public concern, the Court engaged in a balancing of interests under *Pickering*. It found that questioning employees about their confidence in their supervisors undermined close working relations in the office, that circulating the questionnaire caused work time to be lost, and that doing so immediately after a dispute with the employee's supervisors evidenced an act of insubordination. *Id.* at 150-54.

As noted above, and in sharp contrast to most of Ms. Myers' questionnaire in *Connick*, the totality of Ms. McPherson's remarks was an expression of her political beliefs concerning the policies of the Reagan Administration that clearly addressed an issue of public concern. Furthermore, both lower courts found that, as in *Pickering*, there was absolutely no disruption of or effect on employee morale as a direct result of Ms. McPherson's statement (J.A. 42, 134). Constable Rankin himself testified that he did not even consider whether the remark had any disruptive effect on the office, and that he did not care one way or the other (J.A. 85, 86). The remark was made in an area largely, if not totally, inaccessible to the public. *See* page 3 *supra*. No one except Mr. Jackson was meant to hear it. Ms. McPherson happened to make the statement at her work station because that was where she was when she heard the shocking news.

Nor did Ms. McPherson's conversation create anything remotely similar to the "mini-insurrection" evident in *Connick*. As in *Pickering*, it did not refer to her supervisor (or even to the office) in any way.[41] Although

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[41] Ms. McPherson's conversation thus stands in stark contrast to that of the employee in *Yoggerst v. Hedges*, 739 F.2d 293 (7th Cir. 1984), who was reprimanded for telephoning a fellow employee and saying, "Did you hear the good news?," referring to the termination of their supervisor. The Seventh Circuit upheld her reprimand because her remark reflected "personal feelings toward the [supervisor] in the context of the employer-employee relationship," and was therefore not a matter of public concern. *Id.* at 296.

Captain LeVrier happened to overhear it, Ms. McPherson was not aware that he was still present in the room (App. 7a). It was Constable Rankin who, after hearing Captain LeVrier's report, summoned Ms. McPherson and demanded that she repeat to him—entirely out of context—the remark overheard by Captain LeVrier that had concluded her private conversation with Mr. Jackson, the rest of which only Mr. Jackson had heard. The incident came to the attention of other coworkers only after and because she was fired, and became known to the public only because Constable Rankin agreed to be interviewed on television about the matter. *See* page 9 *supra.* Neither this Court nor any court of appeals has upheld the discharge of a public employee who made a remark in the course of a private conversation about a matter of public concern, when the conversation neither caused nor threatened any disruption of office operations.[42]

This is not a case about maintaining office efficiency at all. It is a case about the discharge of an employee who voiced a deplorable thought in a private conversation that had no effect on office efficiency. That thought caused Constable Rankin to "los[e] confidence" in Ms. McPherson because he concluded, without bothering to learn the context of her remarks, that "she was the kind of person who would be a bad employee, would be a negative influence in the office" (J.A. 120). Such an unsupported and altogether subjective character judgment, based solely on a deplorably phrased expression of political opinion that was totally unrelated to Ms. McPherson's job function, is the sole justification advanced for her discharge. As this Court made clear in invalidating the dismissal of a student from a state university

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[42] *See, e.g., Berger v. Battaglia,* 779 F.2d 992 (4th Cir. 1985), *cert. denied,* 106 S. Ct. 2278 (1986); *Gonzalez v. Benavides,* 774 F.2d 1295 (5th Cir. 1985), *cert. denied,* 106 S. Ct. 1789 (1986); *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982); *Van Ooteghem v. Gray,* 654 F.2d 304 (5th Cir. 1981) (en banc) (per curiam), *cert. denied,* 455 U.S. 909 (1982).

for distributing a newspaper containing a tasteless political cartoon, such "disenchantment" is "no justification for denial of constitutional rights." *Papish v. Board of Curators*, 410 U.S. 667, 667-68 n.3 (1973) (per curiam).

This Court has also repeatedly held that governments cannot deprive their citizens of public employment, or other liberty or property interests, because they express or possess unattractive political views. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), it invalidated a state statute that required public employees to take an oath denying past affiliation with the Communist party. In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), it struck down a state statute barring state employment of members of organizations if certain public officials found those organizations "subversive." *See also Baggett v. Bullitt*, 377 U.S. 360 (1964); *Shelton v. Tucker*, 364 U.S. 479 (1960). As Justice Jackson warned long ago, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).[43]

While disfavored views on matters of public concern may be a valid basis for the selection or discharge of public employees in some policymaking positions, "a nonpolicymaking, nonconfidential government employee can-

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[43] The Court has upheld a loyalty oath that requires allegiance to the Constitution. *See, e.g., Cole v. Richardson*, 405 U.S. 676, 679-80 (1972). Ms. McPherson freely took such an oath in this case (*see* J.A. 27). In *Bond v. Floyd*, 385 U.S. 116 (1966), the Court held that subscription to an organization's public statement sympathizing with and supporting draft evaders was not "a call to unlawful refusal to be drafted," *id.* at 133, and could not constitutionally be viewed as inconsistent with an oath of allegiance to the Constitution.

[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Elrod v. Burns*, 427 U.S. 347, 375 (1976) (Stewart, J., concurring in the judgment); *see Branti v. Finkel*, 445 U.S. 507 (1980). *Elrod* involved the improper discharge of employees of a sheriff's office who had duties substantially more important than Ms. McPherson's. One of the employees served as the Chief Deputy of the Process Division and supervised an entire floor of the Sheriff's office. *Elrod*, 427 U.S. at 350-51. Another employee was a bailiff and security guard. *Id.* at 351. In *Branti*, the employees who were held to have been unconstitutionally terminated were public defenders. Since these positions were held to be nonpolicymaking, nonconfidential positions, *a fortiori* the same must be true of a data input clerk who, as the Fifth Circuit found, did nothing more than type what was given to her about the service of civil process (J.A. 136).

At bottom, the United States premises its argument for reversal here on the "decorum and professionalism" ostensibly required of all "lowly" employees in all government offices (U.S. Br. 28). Petitioners themselves make no such claim, arguing instead that those "enforcing the law" are "judged by different standards than are applied to the average citizen" (Pet. Br. 10).[44] In any event, Congress itself has disclaimed any legitimate governmental interest in restricting the private political speech of public employees under such a standard, specifically recognizing that "[a]n employee . . . retains

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[44] Petitioners have never asserted, for example, that Ms. McPherson was terminated pursuant to any provision of Texas law justifying termination "for cause." *Cf. Arnett v. Kennedy*, 416 U.S. 134 (1974) (upholding dismissal for cause under Lloyd-La Follette Act for public statements erroneously claiming that a federal agency superior had accepted a bribe).

the right . . . to express his opinion on political subjects and candidates." [45]

Moreover, this Court has demanded that governmental standards for employee behavior be at least rationally related to the level of the employee's position and degree of contact with the public, and that they be precisely drawn to avoid penalizing the exercise of First Amendment rights. *Shelton v. Tucker*, 364 U.S. 479 (1960). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." [46] In *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), for example, although holding that a "State can require high standards of qualification" for bar membership, the Court required that any such standards "must have a rational connection with the applicant's fitness or capacity to practice law." Constable Rankin's "loss of confidence" in an employee with whom he never personally dealt, on the basis of a private remark whose context he did not bother to learn, falls far short of the required nexus to any need for "professionalism" among employees in the office.

Both petitioners and the United States also contend that a "law enforcement agency" has a legitimate interest in "maintaining the reputation and appearance of being fully committed to enforcement of the law," and in "employing only those persons who project a suitable image," and may discharge anyone who does not project that image (U.S. Br. 11, 22-23). Apart from its mischaracterization of the functions of Constable Rankin's

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[45] *See* 5 U.S.C. § 7324(b). This Court has explicitly recognized this constitutional distinction between private expressions of political views by government employees and their active participation in political campaigns. *See Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 579 (1973).

[46] *NAACP v. Button*, 371 U.S. 415, 438 (1963); *see Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

office,[47] this argument is misplaced here. As the United States concedes (U.S. Br. 16, 18), Ms. McPherson's comment was not directed to the public at all. Nor did she invite public scrutiny of her remark. Surely "project-[ing] a suitable image" is not a constitutionally sufficient reason for a local government to punish a private expression of political views—even one that is deplorably phrased—concerning the policies of the national Administration.

Petitioners (and the United States) seek to justify discharging Ms. McPherson on the ground that her remark demonstrated sympathy with or support for breaking the law. Like Representative Bond's statement in *Bond v. Floyd*, 385 U.S. 116 (1966), however, Ms. McPherson's remark did not support breaking the law. At most, it expressed an extreme lack of support for the policies and actions of the public official who might be the target of an unlawful act. Even assuming that Ms. McPherson actually "meant what she said," her statement connoted at worst such strong dislike for the President's policies that, *if* another attempt on his life were made, she hoped that it would succeed.

Such expressions are not uncommon when the victim of an illegal attack is a public leader who has followed policies or taken actions that offend a particular element

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[47] As the court of appeals found (J.A. 130-31), law enforcement in Harris County is not the province of Constable Rankin's office. Even if it were, Ms. McPherson seeks reinstatement as a clerk/typist, not as a police officer.

We note, however, that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). While police agencies have a legitimate interest in fostering uniform appearance, *Kelley v. Johnson*, 425 U.S. 238, 248 (1976); *cf. Goldman v. Weinberger*, 106 S. Ct. 1310, 1313 (1986), that interest is obviously not at issue here. And "[o]ur problem involves direct, primary First Amendment rights," not hairstyles. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969).

of the public. On May 15, 1972, for example, Governor George Wallace of Alabama was permanently disabled by a would-be assassin. Governor Wallace's earlier actions and policies in opposition to the civil rights of black citizens were widely resented by many Americans of all races, including numerous public employees. Some, in their initial reactions to the news, may well have expressed satisfaction.[48] There was comparable resentment from a different quarter toward the actions and policies of Dr. Martin Luther King, Jr. because of his advocacy of civil rights for black citizens. When Dr. King was assassinated on April 6, 1968, an FBI agent in Atlanta who heard the news was reported to have exclaimed, " 'They finally got the s.o.b.!' " [49] Surveys of public reactions to the announcement of Dr. King's death reveal that this public employee's immediate reaction was not unique.[50] On the theories propounded by petitioners and the United States, impulsive outbreaks like these by public employees would have justified their dismissal.[51]

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[48] *See, e.g., Wash. Post,* May 16, 1972, at A13, col. 3 (quoting a civil rights leader as saying that although the assassination attempt was a tragedy, "[o]ne might be tempted to say this in this case: the chicken came home to roost").

[49] S. OATES, LET THE TRUMPETS SOUND: THE LIFE OF MARTIN LUTHER KING, JR. 494 (1982).

[50] *See, e.g.,* W. CROTTY, ASSASSINATIONS AND THE POLITICAL ORDER 301-09 (1971) (survey of southern students' initial reactions to Dr. King's assassination; 59% of respondents described themselves as indifferent or elated); J. F. KIRKHAM, S. G. LEVY, & W. J. CROTTY, ASSASSINATIONS AND POLITICAL VIOLENCE: A STAFF REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE 89 (1969) (41% of southern white children agreed that "King himself was to blame").

[51] There was also widespread public endorsement of the lawbreaking involved in Jack Ruby's killing of Lee Harvey Oswald. The National Commission on the Causes and Prevention of Violence found that "[o]nly one out of three (thirty-three percent) felt that Oswald should have had a trial, and one in five (twenty percent) was actually pleased when Oswald was shot." J. F. KIRKHAM,

Wishing harm to the President of the United States is a deplorable way of expressing the strength of one's disagreement with the President's perceived policies or actions. Nevertheless, it has never been a punishable offense in the United States, as it was in England, to "compass or imagine the death of the King." [52] Indeed, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). As Justice Black stated:

> Governments need and have ample power to punish treasonable acts. But it does not follow that they must have a further power to punish thought and speech as distinguished from acts. Our own free society should never forget that laws which stigmatize and penalize thought and speech of the unorthodox have a way of reaching, ensnaring and silencing many more people than at first intended.

Wieman v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring).

In Professor Chafee's view, the Framers intended the First Amendment "to wipe out the common law of sedition, and make further prosecutions for criticism of the government, without any incitement to law-breaking, forever impossible." [53] The narrow definition of treason in

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S. G. LEVY, & W. J. CROTTY, *supra*, at 90. Some who condoned this act of lawbreaking must have been public employees.

[52] Statute of Treason, 1350, 25 Edward 3, Stat. 5, ch. 2. Even under English law, however, "loose Words spoken without any Relation to any Act or Design, were not Treason, or an overt Act of it." *Charnock's Case*, 91 Eng. Rep. 533 (K.B. 1695-96). *See also Pine's Case*, 79 Eng. Rep. 703 (K.B. 1628); 4 W. BLACKSTONE, COMMENTARIES *78-81.

[53] Z. CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 21 (1941). The Alien and Sedition Act, 1 Stat. 596 (1798), made it a crime to "print, utter or publish . . . any false, scandalous and malicious writing or writings against . . . the President of the United

Article III had the same purpose of preventing the punishment of citizens for expressing their political thoughts. *See American Communications Ass'n v. Douds*, 339 U.S. 382, 437-38 (1950) (Jackson, J., concurring and dissenting). The treason clauses of the Constitution, while derived from the English Statute of Treason, were carefully modified by the Framers. The Framers adopted the English statute's prohibitions regarding levying war against the state, adhering to its enemies, and giving aid and comfort to them. U.S. CONST. art. III, § 3. But they omitted any analogy to the English prohibition against compassing or imagining the death of the King.[54] And they refused to permit Congress to change this narrower definition of the offense.[55] Under the English statute, charges of compassing the death of the King had been used frequently to suppress political opposition. The Framers guarded against a legislative or judicial extension of the crime of treason in this country that would penalize ordinary, nonviolent political protests. *See generally Watts v. United States*, 394 U.S. 705, 709-12 (1969) (Douglas, J., concurring).[56]

States, with intent to defame [him] . . . ." In the Virginia Resolutions of 1798, Jefferson and Madison harshly condemned that Act as unconstitutional. *New York Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964). Although not held unconstitutional at the time, the Act clearly violated the First Amendment. *Id.* at 273-77.

[54] *See* 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 345-50 (rev. ed. 1966).

[55] *See* U.S. CONST. art. III, § 3 (limiting treasonable conduct "only" to the prescribed offenses).

[56] As James Madison explained, "new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other . . . ." THE FEDERALIST No. 43, at 273 (J. Madison) (C. Rossiter ed. 1961). Similarly, James Wilson stated that "[i]f we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. . . ." 3 M. FARRAND, *supra*, at 163.

If a "loss of confidence" can constitutionally justify the dismissal of a public employee for her private expression of political beliefs, it is difficult to see where the line between permissible and impermissible thought can be drawn. Should it be drawn to forbid wishing harm by unlawful means only to the President, or to any public official no matter how high or how low? Or should it be drawn at wishing harm by unlawful means to anyone, whether in public office or not? Or at wishing harm only to public officials of the same state or nation, or to any public official anywhere in the world (Adolf Hitler, Moammar Qadafi)? Or at expressing such a belief only in the workplace, or anywhere? Or at expressing such a belief aloud or in writing, or merely possessing such a belief without expressing it to others?

As the Fifth Circuit correctly held, Ms. McPherson's interest in privately expressing her thoughts to a close personal friend regarding the policies of the federal government clearly outweighed Constable Rankin's interest in being "comfortable" with her. To reverse that balancing would mean that public employers, despite the First and Fourteenth Amendments, could now impose sanctions against even the lowliest of their employees for the private expression of distasteful political views. This Court has never endorsed such a principle, and should not accept the invitation to do so here. "The priceless heritage of our society is the unrestricted constitutional right of each member to think as he will. Thought control is a copyright of totalitarianism, and we have no claim to it." [57]

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[57] *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3180, 3215 n.21 (1985) (Stevens, J., dissenting) (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 442-43 (1950) (Jackson, J., concurring and dissenting)).

CO

For the foregoing reas
States Court of Appeals
affirmed.

BRUCE V. GRIFFITHS *
GREATER HOUSTON
AMERICAN CIVIL
LIBERTIES UNION
1236 West Gray
Houston, Texas 77019
(713) 524-6021

ALVIN J. BRONSTEIN
DAVID B. GOLDSTEIN
AMERICAN CIVIL
LIBERTIES UNION
132 West 43rd Street
New York, NY 10036
(212) 944-9800

* Counsel of Record

January 30, 1987

CLUSION

ıs, the judgment of the United
or the Fifth Circuit should be

Respectfully submitted,

LLOYD N. CUTLER
WILLIAM R. RICHARDSON, JR.
CARL R. JOHNSTON
TERESA D. BAER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

ANNIE S. GARCY
GORDON QUAN &
ASSOCIATES, P.C.
4848 Loop Central
Suite 800
Houston, Texas 77081
(713) 669-9902

Counsel for Respondent

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-1442

Houston, Texas, January 21, 1985

ARDITH MCPHERSON,

Plaintiff,

vs.

WALTER RANKIN, Individually in his official capacity as Constable, Precinct One (1), of Harris County, Texas; and Harris County, Texas,

Defendants.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE NORMAN W. BLACK

APPEARANCES:

For The Plaintiff:

Ms. Annie S. Garcy
Mr. Bruce Griffiths

For The Defendants:

Mr. Billy E. Lee
Mr. John Mahoney

Court Reporter:

June Simon

* * * *

[64] MS. GARCY: Your Honor, at this point we call the plaintiff, Ardith McPherson.

MS. McPHERSON: Do somebody have to swear me in?

MR. GRIFFITHS: Your Honor, I don't think she took the oath.

THE COURT: Would you swear her in, please.

(Witness sworn.)

ARDITH SHARESE McPHERSON, PLAINTIFF, SWORN

DIRECT EXAMINATION

BY MS. GARCY:

Q Please state your full name for the record.

[65] A Ardith Sharese McPherson.

Q And where were you born?

A Excuse me?

Q Where were you born?

A Oh. In South Bronx, New York.

Q And for how long did you live in New York?

A Eighteen years. Well, nineteen.

Q What specific part of New York were you raised in?

A Well, I was born in Queens, and then when I was ten years old, we moved to the Bronx. And then I was eighteen when I moved with my aunt. She told me—my mother told me to stay here for six months to finish out school, and then come back home after the school was through, and that's what I did.

Q So you moved to Texas to join your mother?

A Right.

Q Now, what part of the Bronx were you living in until you were eighteen? Can you be a little more specific?

A Oh. South Bronx.

Q And what people—what race or nationality of people live in South Bronx?

A Blacks and Puerto Ricans.

Q Okay. And Ms. McPherson, you are a black woman; is that correct?

A Correct.

Q How old are you at this time?

[66] A What? How old when I moved to the Bronx?

Q No. How old are you now?

A Now? Twenty-three.

Q Have you been to college?

A Yes.

Q For how many years did you attend college?

A Just one year.

Q And where did you go?

A Burrough of Manhattan Community College.

Q What was the concentration of your education? What were you studying?

A Secretarial Science.

Q Now, when did you begin to work for Constable Rankin's office?

A January 12 of '81. He told me I was employed to start January 14 of '81.

Q What position were you hired to hold when you first worked for Constable Rankin?

A Clerk Typist. Well, they didn't tell me the position. He just showed me the room and what I would be working on.

Q Okay. In order to get the job, did you have to take any kind of typing test?

A Just a typing test.

Q All right. Well, did anybody ask you any questions?

A Such as what?

[67] Q Did anyone interview you?

A Yes. Mr. Rankin.

Q Okay. How did you hear about the job in the first place?

A I didn't. At that time, since I—it was January, and I came down in July, and I had been looking for a job, and I just was walking into places, and that office happened to be one.

Q Did you know anyone else who worked at the office?

A Yes, I did.

Q Who did you know?

A Lawrence Jackson.

Q How do you know Lawrence Jackson?

A I met him at a park. He is my boyfriend now, and then, too.

Q Okay. Now, please tell Judge Black, what are the duties or responsibilities of a clerk typist?

A We would enter civil papers into a terminal.

Q And is there any dealing with the public? Did you ever talk to members of the public, on your job?

A No, I didn't. I didn't have a phone on my desk.

Q Okay. In the room in which you worked, was it a room that was generally accessible to the public?

A No. We had a sign on the door. I can't remember word for word what it said, but it means that the public wasn't [68] allowed in there.

Q During the time that you worked in that room, do you recall whether any attorneys came in to ask you any questions about papers that were going into the computer?

A No. The only time you would have to give an attorney a paper—they couldn't come back there. You had to go out in the front. And that wasn't part of the clerk typist's job. Those people—Lawrence was doing something different, he was the one authorized to do that.

And then it was this girl that worked in there, named Deborah Patway. She did the same thing, but she was only in there because she didn't have a terminal on her desk. She was in there to use it.

Q What kind of training were you given to learn how to use the CRT?

A A lady came in and she trained me for two days.

Q Okay. And was that training—did it concentrate only on using the computer?

A Yes. And it was both on how to use the computer and how to enter the paper into the computer the correct way.

Q Did you receive any other training?

A No. I haven't.

Q Were you given any training in weapons handling?

A No.

Q Were you ever told that you would be a guard for visiting [69] dignitaries?

A No.

Q Were you required to wear a uniform to work?

A No.

Q Did you wear a gun?

A No.

Q Could you wear a gun?

A No.

Q During the time that you worked for Constable Rankin, did you have a lot of contact with the Constable?

A No.

Q Did you ever speak to him?

A Yes, I did. On some mornings he would come over and he would say, you know, hello, to everybody in the room. Individually go to their desks. And we would say hello back, and he would leave.

He—some mornings we never did even see him. We saw him in the afternoon when he came in. He didn't say hello or anything. He didn't speak to me, you know, hold a conversation. Just Hi.

Q Had you ever spoken with Constable Rankin in his office before the time that he called you in to ask you about your comment?

A No.

Q Now, on March 30, 1981, I'm sure you recall that there [70] was an assassination attempt against the life of the President.

A Yes.

Q Okay. And you were at work that day; is that correct?

A Yes.

Q Now, how did you first hear about the assassination attempt?

A The radio. It was on the radio.

Q Where was the radio?

A The radio was on Heidi Cornelison's desk.

Q And so was the radio in the room in which you were working?

A Right.

Q Now, Ms. McPherson, were you working at the time that you heard that announcement?

A Right. I was entering papers at the same time.

Q Okay. Now, were there other people in the room?

A Yes.

Q Who were they?

A Heidi Conelison [sic], Tina Richardson and Lawrence Jackson and myself.

Q Were the other three people also working?

A Heidi and Tina, they were on their lunch break, but they was taking it inside the office. Just Lawrence was back from lunch, and he was entering papers, and I was entering lots of them.

[71] Q Now, would that hour have normally been your lunch break?

A No. We had different ones. That was their lunch break.

Q Was it common that you might be talking during the time that you were working at the CRT?

A Yes.

Q How frequently was that radio played during the time that you were working?

A Every day, all day, as long as we keep it low.

Q Now, do you remember whether there were any members of the general public in the room at the time that the radio announcement came on?

A No. There weren't.

Q Now, what did the other women in the room do, or how did they respond to the radio announcement? Did you notice?

A They didn't respond, because if they responded, they obviously would have told me something or said something. And, actually, they were talking to Captain LeVrier. That's probably why they didn't hear me.

Q Captain Levrier was also in the room?

A Yes.

Q Now, was he already in the room when the radio announcement came on, or do you think he came in later?

A He came in later. He came in—he takes papers. At the time, he was taking the papers to Precinct 6 and 7.

[72] And he came in the room, and he asked, does anyone have any papers to go to six and seven. Everybody said no. And I believe Lawrence said yes, he did, and he was giving him one.

So at that time, I continued entering papers, and my head was down, so I thought he went out the room. But evidently he didn't go out the room, he was like talking to Heidi and Tina, and they were like—it's like the corner to where I was, where I sat.

And me and Lawrence just continued, you know, on talking. And he was talking to Tina and Heidi. That's why he didn't hear me. And so he—all he heard me say was if they go for him again, I hope they get him. And he thought—took it as a remark, which in a sense it was the tail end of the conversation.

Q Okay. Well, let's go back through your conversation again. To whom—well, let me ask you this way. After you heard the announcement on the radio concern-

ing the President—the assassination attempt against the President, did you talk to anyone?

A Yes.

Q To whom did you talk?

A I talked to Lawrence Jackson.

Q Okay. Did you talk first, or did Lawrence Jackson talk first?

[73] A I talked first.

Q What did you say?

A I said I felt that that would happen sooner or later.

Q Okay. And what did Lawrence say?

A Lawrence said, yeah, agreeing with me.

Q Okay. Now, when you—after Lawrence spoke, then what was your next comment?

A Well, we were talking—it's a wonder why they did that. I felt like it would be a black person that did that, because I feel like most of my kind is on welfare and CETA, and they use medicaid, and at the time, I was thinking that's what it was.

He didn't even get shot then. You know, he was in the—got pushed in the car, they said. But then after I said that, and then Lawrence said, yeah, he's cutting back medicaid and food stamps. And I said, yeah, welfare and CETA. I said, shoot, if they go for him again, I hope they get him. That's the part that LeVrier heard.

Q Were both you and Lawrence discussing cutbacks? Social cutbacks? Or was only—was it only your conversation?

A Just me and Lawrence was talking.

Q Okay. But did Lawrence also say something about cutbacks?

A We weren't—well, you see, we weren't discussing cutbacks. We just—that was the conversation. We just mentioned that.

[74] Q Okay. Well, let me see if I can ask it better. You said that you were talking about the Reagan Administration cutbacks and CETA.

A Lawrence said—okay. Lawrence said, they are cutting back CETA and welfare. Okay. And I said, yeah. And welfare and medicaid. You see, we wasn't discussing it. Because it just all happened in a short span of time.

Q Okay. But both of you were talking about--

A Right.

Q —the cutbacks; is that correct?

A Right.

Q Okay. Now, up until that point, did anyone else participate in the conversation with you and Lawrence?

A No. They were having their own. Just at that point when I said that, then Captain LeVrier showed up.

Q Now, do you think—was that conversation that you had with Lawrence something that—as far as you were concerned, were you talking to Lawrence and to the other people in the room, as well?

A No.

Q Were you talking only to Lawrence?

A Only to Lawrence.

Q Would you consider that to be a public conversation or a personal conversation?

A It was a personal conversation.

[75] Q Okay. Now, Ardith, would you please repeat your comment, to the judge.

A If they go for him again, I hope they get him.

Q Now, does that comment—well, what did you intend by that comment?

A It was just the end of the conversation. It was just a verbal expression. It doesn't mean that I want the man dead.

Q Did you intend at that moment to inflict any kind of harm against the president?

A No. I did not.

Q Did you support the commission of harm—were you hoping that someone would go kill the president?

A No. I was not.

Q Did anyone—after you made that statement, did anyone in the room respond to your statement?

A No. Oh. Well, Captain LeVrier. After I said that, he came to my desk, and he said, you don't mean that, do you. And I just looked up at him in surprise to see him in the room, because I thought he had left after he asked us did we have any papers. And then I just looked up at him and smiled, and he stood there waiting for an answer. And then he left the room.

Q Did you return to working?

A Right.

[76] Q Did your conversation with Lawrence go on to any other topics, or was it over?

A Yeah. We was talking about something else.

Q Now, after you made your comment, did Lawrence Jackson say anything to you like, s-h-h-h, be quiet, don't say that?

A No.

Q Now, what was the next thing that happened to you as a result of your statement?

A Well, in between about five or ten minutes later, Jack came in the room, and he motioned for me to come. He called my name. Then he motioned for me to come here, and then he told me, he said, either Mr. Rankin or either the boss want to see you in his office.

Q And is Jack the chief deputy?

A Right.

Q And what did you say? Did you say anything to Jack in response?

A No. I didn't. I just followed his orders.

Q Now, did you go to the constable's office?

A Yes. I did.

Q Okay. And did the constable give you an opportunity to explain your statement?

A No. He didn't.

Q Would you please tell the judge what did the constable ask you.

[77] A Okay. He pointed where to sit. I knew that meant sit right there, so I sat.

Q He pointed with a what? I'm sorry.

A He pointed with his finger where to sit. So I knew that meant sit down right there, so I sat. And he said, I heard a disturbing remark.

I didn't know what he was talking about, because I didn't know it got to Mr. Rankin. So he said, did you say if they go for him again, you hope they get him. And I said, What? You know, it wasn't what, I didn't hear him, it was what—you know, I was surprised that he knew about it.

And I said, yeah, but I didn't mean—and he went on ahead and said something. And then he asked Captain LeVrier, he said, what do you think she meant by this. He said, I don't think she meant anything by it. She just didn't know how it sound when she said it.

He said, I just won't tolerate that in here. It's a public service office, and we for Reagan, and some other stuff he was saying. And he said, I just won't tolerate that in here.

And at the same time he was saying that, he put his hand on the knob. He was going out there. Ms. May, take her off the payroll. And I knew that meant right there that I was fired.

Q Was Constable Rankin walking out of the room?

[78] A At the same time when he said, I won't tolerate that in here, he was—see, he stood up, and, you know, walking to the door.

Q Did you make any effort to explain your statement?

A I just said, wait a minute, Mr. Rankin. Ms. May, take her off the payroll. And so I just said, oh, boy.

Q So did you go—well, what did you do? Did you leave the constable's office?

A Afterwards, no. Afterwards I said, oh, boy. I just went back in the back and just gathered my things up. And I told Lawrence, you know, what had happened, and it was—oh, it was this—I think she is Vietnamese. I was telling her about what happened, and then Heidi

overheard me. And she said, wow, I didn't even hear you say that, you know.

And I was about to tell Lawrence something, but he was gone. I didn't know where he was at. Then when he came back, he told me he was in Rankin's office.

Q All right. Did you leave Constable Rankin's office?

A Yes. After that, I went home.

Q Did you go—ever go back to Constable Rankin's office?

A Yes. The next day.

Q Why did you go back?

A Because I wanted to talk to him.

Q Why did you want to speak with him?

A I wanted to explain myself. He wouldn't listen to me.

[79] Q Who did you talk to when you went back?

A I talked to his secretary, Ms. May. I asked her if Mr. Rankin was in, because I would like to talk to him. And she said well, he's very busy right now.

Then she said, if you have a seat in the waiting area. I waited out there for an hour, and he was still busy, so I told her I was going to lunch, I'll be back at 12. And I came back at 12, and then she said, oh, Mr. Rankin is still busy. She said, why don't you come back in about two hours.

And I said, okay. So I went somewhere, I guess, you know, and came back. It was two o'clock. And then I said, Ms. May, Mr. Rankin still busy. And she said, hold on a minute. And then she got up and she went in the back to where Mr. Rankin was. And then she came back and she told me, she said Mr. Rankin is still busy. He's going to be busy the whole afternoon.

I said okay, Ms. May. I'm sorry. I won't bother you no more. I said, I'm not going back no more, because I see he don't want to see me.

Q Okay. Were you ever contacted by members of the newspaper media?

A Yes, I was.

Q Did you call them, or did they call you?
A They called me.
[80] Q How soon did they call you?
A Well, this happened on Monday. They called me that Thursday afternoon.
Q Were you contacted by members of the television media?
A Yes, I was. The next day.
Q Did you call them, or did they call you?
A They called me.
Q Did you go on television?
A No. My mother wouldn't let me.
Q Okay. Do you remember whether Constable Rankin went on television?
A Yes. That day I got fired, on the 30th, he was on T.V. that night.
Q Okay. Were you contacted by the Secret Service?
A Yes, I was. The same day, that Thursday, that the newspaper had called me.
Q Now, you were fired on what day of the week?
A It was a Monday.
Q Okay. So when the Secret Service came to your house, did they call you and make an appointment first, or just—
A No, they didn't.
Q How many people came from the Secret Service?
A It was two men.
Q Okay. What did they tell you about the report that they had received concerning your remark?
[81] A Excuse me?
Q What did they tell you about why they were there to see you?
A Oh, they told me that they thought it was a prank call, but they said they got a call, they said they think it was a prank call, but they have to investigate any call that they get.
Q And did they ask you questions?

A Yeah. Well, one of them, he proceeded to talk to my mother. And the other one told me he had some papers for me to fill out, and he said, can we sit at the table. I said sure.

Q Okay. And did you fill out some papers?

A Well, one paper was—he told me, he said it was the Constitution of the United States, and it was typewritten. And he told me he want me to write that down in handwriting, he said because they have some threatening letters up in Washington, to the President, and he want to compare mine with that, to see if I sent any threatening letters.

I said, sure, I'll do it, because I don't have nothing to hide. Then he gave me this other paper, and he said, this is to give us permission to go to all mental institutions—I don't know if he said in Texas or in Houston—he said to go to the mental institutions to see if I was ever committed in any one of them.

[82] I said, sure, I ain't got nothing to hide. I ain't never been in any of them.

Q Okay. Now, did the Secret Service ever come back to see you again?

A No. They didn't. They just—when they left, they just told my mama and me that they were sorry. They said that they knew it was a prank call, they just have to come out and investigate. They said that's the procedure.

Q Now, how did you feel about the Secret Service contacting you?

A How did I feel? I was angry. I was paranoid, for one thing.

Q Okay.

A Upset.

Q Well, do you think that your comment was something important enough to justify the Secret Service coming to see you?

A No, I don't. I think it was just a little something that was said in the office. It was true enough it was in

the office, but it was to someone else, and I think it should have stayed there in the office.

Q Ardith, nothwithstanding your statement concerning President Reagan, do you think—I mean, is it your testimony that you would follow all the rules and the regulations of Constable Rankin's office if you worked for [83] him?

A Yes. I would follow his rules.

Q Okay. Ardith, I need to show you what has been marked as exhibit number 9, I think. Yes. Now, the first page of that exhibit, could you please tell the judge what Burnett is.

A Burnett is a temporary agency that, you know, you call them every morning and then they will call you back and let you know if they have a job for you to go out on.

Q And have you had occasion to work through that agency since the time that you left employment with Constable Rankin?

A Yes. I have.

Q Okay. And how much, in all, have you earned with that agency?

A Well, let me see. In '83, it says I had earned $471.63. In '84, it says I have earned $2,844.26.

Q Now, on the second page of exhibit number 8, there is a W-2 form. Is that from an employer with whom you have worked after the time that you left Constable Rankin's office?

A Yes, it is.

Q Okay. And what employer is that?

A It's Kelly Services. It's another temporary agency.

Q How were you employed with Kelly? As a temporary clerical worker?

A Oh, yeah. They were sending me out on clerical [84] assignments. Secretarial assignments. It depends on what the company is asking for.

Q How much does the W-2 form reflect that you earned with Kelly?

A It says I earned $5,350.

Q Thank you. Have you also been employed with Sofwear Shoes, since the time that you left employment with Constable Rankin?

A Yeah. That was the same year I left his office.

Q And could you please give the judge an approximation of your total earnings with Sofwear Shoes.

A It was approximately $10,000 a year.

Q Now, Ms. McPherson, how much money were you earning per hour during the time that you were working for Constable Rankin?

A I was earning the minimum wage, $3.35 an hour. And in between that time and the time I had left, which is January of '83, I have been making—I went up to 3.50, 3.75, 4.15 and then 4.50.

Q How many hours a week did you work when you were working for Constable Rankin?

A Forty hours.

Q Okay. Now, did you work a 40-hour week for Sofwear Shoes?

A Yes, I did.

[85] Q Do you recall when you began working for Sofwear Shoes?

A 7-29 of '81.

Q Okay. For how long a period of time did you work —well, do you remember when you left Sofwear Shoes?

A All I know was 1-83,and it was the first week in January.

Q And then did you go to work then for the Kelly Girls?

A Well, I had signed up with them. Oh, after Sofwear had laid me off, I went to unemployment. At the end of the month, I said I didn't find anything.

Q How much did you receive in unemployment benefits each week?

A $94 a week.

Q And until what date were you on unemployment?

A To what date? It was some day in July that it ran out in, and they told me something about extended benefits, and that lasted through September. So the end of September was the last check I had got.

Q That would be September, 1983?

A Yeah. '83.

Q Okay. And then did you begin working with Kelly in September, '83.

A No. Not yet. Kelly, I only worked with them a half a day assignment in '83.

Q Okay. Well, then—

[86] A And it was '84 that you could really say I worked for Kelly.

Q Okay. So you only had half-day assignments up until 1984?

A No. I worked with Burnett. I was working with Burnett.

Q Okay. And then after you worked for Burnett, then did you work for Kelly Girls?

A Yeah. Yes, I did. But that was—

Q Or was it at the same time?

A Huh-uh. Only time I worked for Kelly in '83 was a half a day assignment.

Q Okay. I just need to repeat to clarify in the record. You worked for Sofwear Shoes from July, 1981 through January, 1983; is that correct?

A Yes.

Q So you worked there all through 1982?

A Right.

Q Okay. And are you cu rently working with Burnett?

A Yes.

Q Okay.

A And Kelly.

Q Now, do they guarantee you 40-hour weeks?

A No.

Q And what is your hourly wage when you do work?

A It differs on the type of job we are doing.

[87] MS. GARCY: I'll pass the witness, Your Honor.
THE COURT: Mr. Lee.
MR. LEE: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. LEE:

Q Ms. McPherson, I understood you to say that you had a year of college before coming to Texas.
A That's correct, sir.
Q Was it a prerequisite of getting into college that you have a high school graduation diploma?
A Yes, I do.
Q Where was that high school graduation?
A Avery Fisher Hall in New York.
Q All right. Is that from a school in the State of New York, that you graduated?
A The diploma is from a school in New York where I graduated. The graduation was at a big production hall.
Q All right. You did graduate, though, from a school in New York?
A Yes, I did.
Q A state school?
A Yes. I have.
Q As a part of the curriculum in that school, did they teach the English language?
A Yes, they did.
[88] Q Did you take all of your classes in English?
A Yes, I have. I majored in English.
Q And you did pass the course?
A Yes, I have.
Q You read and write English?
A Yes.
Q You speak and understand English?
A Yes.
MR. LEE: May I approach the witness and examine plaintiff's exhibit 1, Your Honor?
THE COURT: Yes, sir.

BY MR. LEE:

Q Ms. McPherson, on plaintiff's exhibit 1 is attached to it an application and contract of employment. And do you recognize your name as being on this instrument?

A Yes, I do.

Q And, in particular, at the bottom half of the instrument, dated January 12th, 1981, an instrument that is capitalized as deputation.

A Do I see it?

Q Do you see it?

A Oh, yes.

Q All right. And do you notice that it says, I, Walter H. Rankin, Constable, precinct number 1, having full confidence in Ardith S. McPherson, do nominate and appoint [89] him, the said Ardith S. McPherson, true and lawful deputy in my name, stead, place and stead, to do and perform any and all things pertaining to the office of said constable?

A Yes, I see that.

Q All right. And down below there then is an oath of office. And do you recognize your signature to that oath of office?

A Yes.

Q And in that oath of office, do you not say that you will faithfully execute the duties of—and it's typed in, clerk—and will to the best of your ability preserve, protect and defend the Constitution and laws of the United States and of this state?

A Yeah.

Q All right. When you signed this instrument, did you have in your mind any reservation as to what you meant by taking the deputization oath and swearing to uphold the Constitution and laws of the United States?

A Well, if I signed this, it means I—maybe because it was written in words that I swore, but no one told me to raise my hand like I did just now and—I didn't swear that way.

And when I signed this paper, if it matters any, when I signed this paper, Rankin's signature was not there, and if I am correct—which I do not remember—I don't even think this stuff was typed in.

[90] Q All right. Do you have a reservation in your mind now to taking an oath to uphold the Constitution and Laws of the United States.

A No, I don't.

Q Do you have any reservation in your mind now to be a deputy of Constable Rankin and do in his place and stead anything that he could do?

A I don't understand. Say that again. I mean, if you are asking me, you know, like would I sign, it's yes.

Q You did sign it?

A I mean would I feel that—

Q But when you signed it, did you have your fingers crossed where you said pick a lock, I don't mean this, but I'm going to sign it to get paid?

A Oh, no.

Q You did mean then at the time that you entered this contract, that you would be a Deputy Constable and do Rankin's work for Rankin?

A Yes.

Q Like Rankin would want it done?

A Yes.

Q And you would uphold the Constitution and Laws of the United States and of the State of Texas?

A Right.

Q All right. Let us go then to your pleadings. In [91] paragraph numbered 16 of your complaint filed with this court, you have said here that during the course of said private discussion, plaintiff—that's you—

A Uh-huh.

Q —stated to the other employees, "I hope if they go for him"—and in parenthesis President Reagan is inserted—"I hope if they go for him again, they get him."

Now, is that a correct interpretation of what you said?

A That is correct, sir.

Q All right. Now, that's in English. Is there any reservation in your mind as to the truth of that statement?

A Okay. It's—

MR. GRIFFITHS: Objection, Your Honor. We are going to object to what statement he is referring to, whether it is the truth of the statement quoted or the truth of the statement in the complaint. It's not clear whether he is asking her is it true that your complaint says that, or is it true that you said it, or is it true—is the statement somehow true. I think it needs to be clarified before she can answer that.

THE COURT: Would you restate the question.

MR. LEE: All right.

BY MR LEE:

Q Is that statement in your complaint as you made the [92] statement in the computer room?

A Yes.

Q All right. And that was made in English?

A Yes.

Q It didn't have any foreign language meanings to any of it?

A No.

Q All right. Now, when we were in trial here before—and this was February 14, 1983—page 17 of the transcript of the hearing there, we have an answer, and the answer is—I believe we will find is you, and the person asking the question is your attorney, Ms. Garcy.

A Okay.

Q All right. And at page 16, line 21, this is the answer, so you are talking here and you are telling the court, "And then—oh, after I said the comment you are talking about, in comes Captain LeVrier. He props up on the side where I couldn't see, and I saw him. And he said, 'You didn't mean that', you know. And he was supposed to be talking to Heidi and Tina at that time,

so obviously, he wasn't listening to what they were saying. He was listening to me having my conversation with someone else."

At line 5 on page 17 you are continuing, "He said, 'You didn't mean that.' I looked at him in surprise because I thought he left the room. I didn't say nothing. I smiled [93] and he smiled back at me, and he walked out the room. I didn't think nothing of it."

All right. Now, you have told me that you understand English. Captain LeVrier asked you, you didn't mean that. And you say, you didn't say nothing.

A I didn't say anything. I just (indicating), just like that.

Q All right. Is Captain Levrier any way your supervisor?

A No.

Q Is he your superior officer?

A No.

Q All right. He is not entitled to an answer when he asks you a question, if you mean it?

A No.

MR. LEE: Very good.

I have nothing further of this witness, Your Honor.

THE COURT: All right.

REDIRECT EXAMINATION

BY MS. GARCY:

Q Is Lawrence Jackson a black man?

A Yes.

MS GARCY: Okay.

Your Honor, I have nothing further.

EXAMINATION

[94] BY THE COURT:

Q Ms. McPherson, you said you went back to the constable's office the day after this incident, to talk to

Constable Rankin and explain everything to him; is that right?

A Yes, Your Honor.

Q Well, he is sitting over there right now. Why don't you explain it to him now so I can hear you.

A Okay. Well, Mr. Rankin, what I wanted to tell you the next—that day, and the next day, was that I didn't mean anything by what I said. I didn't literally mean, you know, to go out and kill the President, anyone go out and kill the President. It was just a verbal expression, and it was the end of the subject.

Me and Lawrence was talking and having a conversation in the office, like we always do. And what Captain LeVrier heard—see, he was talking to Heidi and Tina, and what he heard was the end of the subject. And, see, then he went back and told Riley that, and when he went back and told you, they said it was a remark. It wasn't a remark. It was the end of the conversation. He didn't hear anything else.

Q And you just meant to say that you were unhappy with President Reagan?

A Right. I just disagreed with his policy.

THE COURT: All right.

Anything further?

[95] MS. GARCY: Nothing further.

MR. LEE: Nothing further, Your Honor.

THE COURT: Thank you, ma'am. You may go back to counsel table.

THE WITNESS: Thank you.

* * * *

[137] MS. GARCY: Your Honor, we would call Lawrence Jackson.

THE COURT: All right.

You were sworn this morning, weren't you?

MR. JACKSON: Yes, sir.

LAWRENCE JACKSON, PLAINTIFF'S WITNESS, SWORN

DIRECT EXAMINATION

BY MS. GARCY:

Q State your name for the record.
A Lawrence Jackson.
Q Okay. How old are you?
A Twenty-six.
Q Are you a black man?
A Repeat your question.
Q Are you a black man? Are you of the black race?
[138] A Yes, I am.
Q Are you a resident of Houston, Texas?
A Yes.
Q And have you previously testified in this case?
A Yes, I have.
Q At the time that you testified in this case in February, 1983, were you employed by Constable Rankin?
A Yes.
Q And have you left that job since that time?
A Yes, I have.
Q For how long a time, in all, did you work for Constable Rankin?
A Two and a half years.
Q Did you have the same job position the entire two and a half years?
A Yes.
Q And what was that position?
A I was a deputy clerk.
Q What were your job duties as deputy clerk?
A Well, my main responsibilities were data entry retrieval, entering different documents into the CRT, and I picked up papers from the district and county clerk's office.
Q Is that the same job that Ardith McPherson had when she worked for the Constable?
A Yes.

[139] Q And did you two work in the same room?

A At the time, yes.

Q How closely were you seated to each other?

A Well, we were a few feet away from each other.

Q Was it common that you and Ardith would talk to each other during the work day?

A Yes, it was.

Q Was it common that the deputy clerk typists would talk among each other during the work day?

A Yes, it was, basically to break the monotony.

Q In order to talk to Ardith McPherson, did you need to yell or raise your voice in any way?

A No.

Q How many other clerk typists worked in that room in March of 1981?

A It was six, as a total, if you include the supervisor.

Q Okay. Is that room set off from the general public?

A Yes, it is.

Q How is it set off?

A Well, from the main entrance into the office, it was down the hall to your left. And generally the public never did come that way unless they were going to the warrant division, which was past our office.

Q Was there any kind of a sign on the door concerning who was authorized to enter the room?

[140] A Well, at the time, on the glass it was a large sign saying absolutely no one was supposed to enter this room.

Q Did any members of the general public ever enter that room?

A No. If it was, it was very, very, very rare.

Q Okay. And on those rare occasions, who were the people who would come into the room?

A Well, from time to time, if any, it would be an attorney, if he was picking up a civil paper if that was to be returned back to court, and he probably would

want to talk it through. I mean, he would probably want to walk it through, himself, instead of letting it go through the district clerk or county clerk's office, if it had to be in court maybe that day or the next day, and the court would have had to have that returned.

Q Okay. Now, in order to work as a clerk typist, you didn't need any certification as a law enforcement officer, did you?

A No, you didn't.

Q As best as you can recall, during the time that you worked there, were there other persons who were assigned to work as clerk typists, who were not promoted to other positions in the Constable's office?

A Well, there was other clerks, as you say, that they may have changed from one section to another, but they would [141] still be a deputy clerk within that office.

Q Okay. Would it require a promotion or a reassignment in order for you to go out and serve papers?

A No.

Q But would it require any other training for you to go out and serve papers?

A No.

A Would it require any certification of some sort?

A No.

Q Well, are you personally already certified, or in the past have you been certified to serve civil papers?

A Yes, I have. I have been through the Sheriff's Academy.

Q So is that why you are saying no, because you personally are qualified to do that?

A Yes.

Q Okay. But in order for you to have served papers in the past, did you need that training?

A Yes, you would. You would have to be a certified officer. If you was working on a full capacity, you would have to be certified and commissioned, whereas they had other officers who just worked in the evenings. They was reserve deputy constables. And they was also authorized

to serve papers. But they would have to have that training in order to go out and serve a paper.

Q Okay. So for the other clerk typists who were hired on, [142] and, for example, were not commissioned or trained in any way, would they require additional training in order to be assigned to serve papers?

A No. They still would have to go through—they would have to go through that academy.

Q Okay. How close a relationship did Constable Rankin maintain with the clerk typists in his office during the time that Ardith worked there?

A Well, I would say pretty loose, you know. Well, at least that's the way it was between me and Constable Rankin. We spoke, hello, and everything, but we never did get close.

Q Okay. Did you have conservations with the constable on a daily basis?

A No. Not really.

Q Did you ever have to go into his office to discuss with him the duties of your job?

A No.

Q Would he come into the office where you worked, for any reason other than to say hello to the other workers, for example?

A No.

Q How frequently would he come into the office where you were working?

A Well, at the time, maybe about twice a week.

Q How long did you know Ardith before she came to work [143] in Constable Rankin's office?

A Around five months.

Q Now, were you working at Constable Rankin's office in March, 1981, when there was an assassination attempt against President Reagan?

A Yes, I was.

Q And were you in the office working at the time that you first learned of that event?

A Yes.

Q Okay. How did you first learn about that event?

A I learned about it through the radio broadcast, that there was an attempt on the President's life.

Q And was the radio—where was the radio?

A Well, it was—basically, it was almost next to me, but it was just a few feet away. I can get up and turn it up or turn it down.

Q How frequently was the radio turned on during the work day?

A Well, it was turned on every day, and it would stay on basically throughout the whole time we was working.

Q When you first heard the news about the assassination attempt, how did other people in the room—aside from you and Ardith, how did other people in the room react?

A Well, they was quite shocked.

Q And who were the other people in the room?

[144] A Well, at the time when we first heard the broadcast, it was Heidi, Tina, and there was Tiki, or—excuse me, Ardith—and myself.

Q What was your reaction when you first heard the news about the assassination attempt?

A I also was shocked.

Q Did you discuss the attempt with anyone?

A Well, not right away. At first I listened to hear further details about his attempt. Then later on, Ardith and I, we broke off into a little conversation about the social programs that he was cutting back on.

Q Who began the conversation between you and Ardith?

A She did.

Q And what did she say to you?

A Well, after getting my attention, you know, she felt that it was going to happen, you know, sooner or later, and we started talking, and then right away we started talking about the programs like welfare, food stamps, CETA programs, and social security, because

those are the ones that was on the news the most frequently, so those was the topics that we was discussing at that time.

Q Did each of you make comments concerning the social program cutbacks?

A Excuse me?

Q Did both of you make comments concerning the welfare [145] cutbacks?

A Well, we just mentioned them. We didn't go into too much detail about it.

Q Okay. Could you please explain, did Ardith McPherson say anything more to you after you discussed the cutbacks in social programs?

A Well, during our conversation—well, she brought it up. Well, she said, I hope the next time, they get him. But that was it. I continued on working, and I assumed she had, too.

Q Okay. Now, at the time that you and Ardith were talking, were you talking to Ardith only, or were you talking to anybody else in the room?

A I was just talking to her. No one else.

Q In your opinion, was that a private conversation?

A I would say so. It was private, because I wasn't talking in general, and neither was she. Well, meaning general, I wasn't including everyone else in the office. I was just talking to her.

Q What do you think that Ardith meant by her comment about the President?

A Well, I don't think that she meant any harm, or anything of that nature. I basically felt that it was a response and an expression.

Q Okay. And what do you think it responded to?

[146] A Well, she responded to what she had heard on the radio. The broadcast.

Q Do you think that Ardith McPherson meant to do anything to the President?

A No, I don't.

Q While you were talking to Ardith, were you aware of whether anyone was listening to any of your conversation?

A. No. I was not aware.

Q How did you first become aware that someone heard part of your conversation?

A Well, after she said her last line in her conversation, Captain LeVrier appeared in front of her desk—well, her cubicle, because we had two dividers on both—everyone had two dividers on the side of their desk and terminal, so you couldn't see really who was to the left or to the right of you unless you leaned forward to look either way.

And he appeared at the front of her desk. And he said to her, well, you don't mean that, do you. And she appeared shocked. And I was just looking at them both. And she didn't say anything, and he left out.

Q Were you surprised that Captain LeVrier had heard part of that conversation?

A I was very much surprised, because he was already involved in another conversation with two other ladies, and on top of that, the radio was still playing. And of course, me and her—me and Ardith—was talking, so I was very much surprised that he had heard what he did hear.

Q Did the other two workers in the office say anything to you in response to the conversation that you and Ardith were having?

A No. They didn't say nothing.

Q Were any members of the general public coming into the room after the conversation? Immediately after?

A No. No one.

Q How did you first learn that Ardith McPherson had been fired?

A Well, first of all, I was still working at my terminal, adn Captain LeVrier was coming up to my terminal, or to my desk. And he said to me, let me tell you something. I only speak the truth, and—you know.

And I looked up at him, and I said, what are you talking about? And immediately behind him—well, Ardith was walking behind him. And she said, Lawrence, I just got fired. And I said, for what. She said, because of what I said. And I said, well, what did you say. And she said, what I said about the President.

I still was rather shocked because that was a conversation we had had earlier, and I had forgot that Captain LeVrier had heard at that time. And he went out and probably said something about it. So I was quite shocked. [148] Q Did Constable Rankin ever question you concerning the content of your conversation with Ardith McPherson?

A To my knowledge, no.

Q And did anyone else in the office ever ask you about what you and she had been talking about?

A No.

MS. GARCY: I'll pass the witness, Your Honor.

THE COURT: Okay. Mr. Lee.

MR. LEE: I have no question of Mr. Jackson, Your Honor.

THE COURT: Thank you, Mr. Jackson.

MS. GARCY: Your Honor, plaintiff rests.

* * * *

FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 85-2068

CONSTABLE WALTER H. RANKIN, ET AL.,
Petitioners

v.

ARDITH McPHERSON,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

MIKE DRISCOLL*
County Attorney
Harris County, Texas

BILLY E. LEE
Assistant County Attorney
1001 Preston
Suite 634
Houston, Texas 77002
(713) 221-5101
Attorneys for Petitioners

*Of Counsel

MARCH 1987

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

INDEX OF AUTHORITIES

CASES	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	11
Bethel School District No. 403 v. Fraser, No. 84-1667 (July 7, 1986)	7
Brandenburg v. Ohio, 395 U.S. 444 (1969)	8
Branti v. Finkel, 445 U.S. 507 (1980)	2, 13, 14
Central Hudson Gas & Elec. Corp. v. Public Service Comm'n., 447 U.S. 557 (1980)	6
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	7, 9
Cole v. Richardson, 405 U.S. 676 (1972)	11
Connick v. Myers, 461 U.S. 138 (1983)	*passim*
Cornelius v. NAACP Legal Defense and Educational Fund, Inc., No. 84-312 (July 2, 1985)	14
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)	10
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., No. 83-18 (June 26, 1985)	4, 7, 8, 9
Elfbrandt v. Russell, 384 U.S. 11 (1966)	10
Elrod v. Burns, 427 U.S. 347 (1976)	13, 14
FCC v. Pacifica Foundation, 438 U.S. 726 (1978)	7, 9
Frohwerk v. United States, 249 U.S. 204 (1919)	8
Harisiades v. Shaughnessy, 342 U.S. 580 (1952)	8
Keyishian v. Board of Regents, 385 U.S. 589 (1967)	10
Mine Workers v. Illinois Bar Ass'n., 389 U.S. 217 (1967)	9
New York v. Ferber, 458 U.S. 747 (1982)	6, 7, 8, 9
Olmstead v. United States, 277 U.S. 438 (1928)	12
Parker v. Levy, 417 U.S. 733 (1974)	9
Perry Education Assn v. Perry Local Educators' Assn, 460 U.S. 37 (1983)	14
Pickering v. Board of Education, 391 U.S. 571	6, 10, 15
Posados de Puerto Rico Assoc. v. Tourism Co., No. 84-1903 (July 1, 1986)	15
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	3
Roth v. United States, 354 U.S. 476 (1957)	7
United States v. Robel, 389 U.S. 258 (1967)	10
Watts v. United States, 394 U.S. 705 (1969)	10
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	9

Page

UNITED STATES CONSTITUTION

First Amendment ..... *passim*

UNITED STATES STATUTES

18 U.S.C. § 871(a) 10

TEXT

A. Bickel, *The Morality of Consent* 62 (1975) 9

LAW REVIEW ARTICLE

Bork, *Neutral Principles And Some First Amendment Problems*, 47 Ind. L.J. 1 (1971) 9

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REPLY BRIEF FOR THE PETITIONERS

As the Solicitor General has joined us in explaining, this Court's decision in *Connick v. Myers,* 461 U.S. 138 (1983), requires reversal of the judgment below. Respondent's remark expressing her genuine desire for the assassination of the President did not touch on a "matter of public concern" within the *Connick* Court's understanding of that term. Moreover, whatever limited First Amendment value exists in respondent's statement is

clearly outweighed by the countervailing interests of the law enforcement agency for which she worked. Respondent's arguments to the contrary are unfounded.[1]

1. Respondent first contends (Resp. Br. 19-25) that her remark was "a protected form of political hyperbole" that represented a mere expression of unhappiness with the President's policies. In seeking to characterize her statement in this way, respondent asks this Court to set aside the district court's contrary findings of fact. There is no reason to do so.

The district court in this case expressly defined "the serious question" for decision on remand to be "what did [respondent] 'mean' " by her statement (Pet. App. 25a). It then found incredible respondent's testimony that "she meant nothing, * * * that those words were mere political hyperbole" (*ibid.*). Rather, the court found that respondent's statement was "something more than political hyperbole," that her words "expressed such dislike of a high public government official as to be violent words, in context" (*ibid.*). On appeal, the Fifth Circuit found that "the record supports the district court's conclusion that [respondent] expressed an actual wish for the assassination of the President" (*id.* at 39a), especially since the district court's conclusion "may have been based in part on the demeanor of the witnesses" (*ibid.*).

This Court has a "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred" (*Branti v. Finkel,* 445 U.S. 507, 512 n.6 (1980)). The finding of the courts below that respond-

1. This reply brief, while representing the views of petitioners has been prepared in consultation with the Solicitor General.

ent's remark expressed an actual wish for the assassination of the President is precisely such a factual determination See *Pullman-Standard v. Swint*, 456 U.S. 273, 287-288 (1982). No exceptional circumstances justify reconsideration of that finding by this Court now.[2]

2. Amicus National Education Association (NEA) contends (NEA Br. 13-14) that, because "[t]his case does not involve speech over 'internal office affairs' or an 'employee grievance,' *Connick's* discussion of the limitations that apply to First Amendment claims [of public employees] has no application here." Amicus argues, in other words, that a public employee's speech should *always* be deemed to address a "matter of legitimate public concern," as that phrase was used in *Connick*, unless the speech addresses "internal office affairs" or "an employee's grievance," the particular subjects held not to be "matters of public concern" by the Court in *Connick*. This effort to confine *Connick* to its facts is untenable.

Much employee expression unrelated to "internal office affairs" or "employee grievances" does not touch on "matters of public concern," within the *Connick* Court's meaning of that term. Gossip among employees about mutual friends and acquaintances is purely a private matter. Routine use of profanity and obscenity by employees does not constitute speech on a "matter of public concern." And, without exhausting the available examples,

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2. The Court's statement in *Connick* (461 U.S. at 147-149 & nn. 7, 10) that it will examine the whole record to determine whether an expression touches on a "matter of public concern" is completely consistent with this rule. The statement in *Connick* refers to the legal characterization of a remark, not the subsidiary factual determinations concerning exactly what a speaker said, when she said it, and what she subjectively "meant" by her statement.

sexual invitations from one employee to another clearly do not address any public issue.

Under amicus's interpretation of *Connick*, an employer's decision to dismiss an employee for engaging in any of these kinds of expression would be subject to judicial review. But *Connick* determined that, where employee speech does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to [this kind of] behavior" (461 U.S. at 147). The *Connick* Court wished to ensure that "government officials * * * enjoy wide latitude in managing their offices[ ] without intrusive oversight by the judiciary in the name of the First Amendment" (461 U.S. at 146). Since amicus's proposed interpretation would undermine the *Connick* decision's motivating purpose, it must be rejected.[3]

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3. As the Solicitor General has noted (U.S. Br. 14), that the limitations on public employee free speech claims discussed in *Connick* apply to expression which is not tied to "internal office affairs" or "a personal employment dispute" is evidenced by the Court's subsequent decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985). It is true, as amicus NEA notes (NEA Br. 14-15 n.9), that *Dun & Bradstreet* and *Connick* invoked the "public concern" inquiry for different purposes—in *Dun & Bradstreet*, to determine whether punitive damages could be awarded in the absence of a showing of actual malice; in *Connick*, to determine whether a public employee could be discharged in the absence of a particularized showing concerning the reasons for the decision. But that difference does not, as amicus suggests, make *Dun & Bradstreet* irrelevant to the question whether a public employer may discharge an employee for engaging in expressive activity that is unrelated to "internal office affairs" or "a personal employment dispute" without providing a particularized list of reasons for judicial weighing. To the contrary, it shows that *Dun & Bradstreet* is relevant to that question; it shows that the "content, form, and context" analysis of *Connick* is not limited to speech concerning "internal office affairs" or "personal employment disputes" and that the *Connick* decision is not the aberration in First Amendment law that amicus makes it out to be.

3. Respondent argues (Resp. Br. 25-29) that her statement should be treated as "political speech" because it came at the end of, and was associated with, a conversation in which she expressed "her opposition to the President's policies" (*id.* at 27). Respondent seeks to defend the judgment below, in other words, on the theory that the "matter of public concern" addressed by her remark was "the political, social, and economic policies of a national administration" (*ibid.*). Respondent's effort fails for three reasons.

First, the rationale that respondent offers is one that the court of appeals declined to adopt. That court accepted the district court's finding that respondent's remark expressed a genuine desire for the President's assassination; the court then held that the "matter of public concern" addressed by her remark was "the life and death of the president." Pet. App. 36a. In seeking to redefine the "matter of public concern" as "the Administration's policies," respondent is asking this Court to set aside the district court's finding—a finding accepted by the court below as not clearly erroneous—that her remark was "something more than political hyperbole" (*id.* at 25a). As we have explained earlier (see page 2, *supra*), there is no justification for departing from the lower courts' concurrent findings of fact.

Second, respondent's argument misconceives the legal analysis required by the Court's decision in *Connick*. The Court there expressly determined that the district court "got off on the wrong foot * * * by initially finding that, '[t]aken as a whole, the issues presented in the questionnaire * * * are matters of public importance and concern'" (461 U.S. at 143 (citation omitted)). It admonished that the district court should have examined

the "content, form, and context" of each statement in the questionnaire in order to determine *which* statements touched on "matters of public concern." See *id.* at 147-149. On that view, the Court separately examined *each* statement to determine whether it made an independent contribution to the " 'free and open debate [that] is vital to informed decisionmaking by the electorate' " (*Connick v. Myers,* 461 U.S. at 145, quoting *Pickering v. Board of Education,* 391 U.S. at 571-572). The mere fact that the questions concerning "internal office affairs" appeared in the same questionnaire as the question concerning whether employees felt pressured to work in political campaigns was not a sufficient basis for holding that the former, like the latter, touched on "matters of public concern." See 461 U.S. at 147-149.

Third, respondent's argument would enable public employees artificially to elevate their non-public speech to the highest level of First Amendment protection. As the court below observed, under respondent's interpretation "public employees could wrap the protective mantle of the first amendment around a string of gutter words simply by appending a remark to the effect that those words describe some public figure or policy" (Pet App. 35a-36a). This Court has repeatedly refused to aggregate expressive actions for this very reason. See *New York v. Ferber,* 458 U.S. 747, 761 (1982) ("Even a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography"); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n.,* 447 U.S. 557, 562-563 n.5 (1980) (though "utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues[,] [t]here is no reason for providing similar constitutional protection

when such statements are made only in the context of commercial transactions"); cf. *Bethel School District No. 403 v. Fraser*, No. 84-1667 (July 7, 1986) (fact that sexually explicit metaphors occurred in context of speech given to a student government assembly did not make them protected under the First Amendment).

4. Respondent and amicus NEA argue in the alternative (Br. Resp. 25-29; Br. NEA 15-20) that a statement about the desirability of assassinating the President *inherently* touches on a "matter of public concern." This argument misunderstands the "public concern" standard enunciated by this Court's decisions.

The public concern standard is part of an acknowledgment by this Court that "not all speech is of equal First Amendment importance" (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, slip op. 8). Some expression, such as obscenity and fighting words, contributes little to the interchange of ideas and, because the countervailing governmental interest are significant, may be criminalized. See *New York v. Ferber*, 458 U.S. 747 (1982); *Roth v. United States*, 354 U.S. 476, 483 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Other expression, such as commercial speech and indecent words, similarly is "solely in the individual interest of the speaker and [her] specific audience" (*Dun & Bradstreet*, slip op. 12), but the "evil to be restricted [does not] so overwhelmingly outweigh[ ] the expressive interests, if any, at stake [to obviate the need for] case-by-case adjudication" (*New York v. Ferber*, 458 U.S. at 763-764). Thus, such expression receives some First Amendment protection. See *Connick v. Myers*, 461 U.S. at 148-149; *FCC v. Pacifica Foundation*, 438 U.S. 726, 744-751 (1978) (opinion of Stevens, J.). Finally, other

expression—that which addresses matters of "serious literary, artistic, political, or scientific value" to the community (*New York v. Ferber*, 458 U.S. at 761)—relates to "matters of public concern" and receives the highest degree of protection available under the First Amendment. See *Dun & Bradstreet*, slip op. 8-13; *Connick v. Myers*, 461 U.S. at 145.

Speech expressing approval of the assassination of the President clearly does not address a matter of "public concern." Such expression cannot be said to have "serious literary, artistic, political, or scientific value" to the community. *New York v. Ferber*, 458 U.S. at 763-764. It does not address a subject that may be legally or constitutionally turned into public action by a democratic majority; to the contrary, it advocates rejection of the processes that our Constitution establishes for defining political and social truth. For this reason, the Court has long held that such expression is entitled to *no* protection under the First Amendment when it is likely to incite or produce imminent and lawless action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-592 (1952); *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). While expression that merely favors the assassination of the President obviously does not present an imminent threat to the stability of the constitutional order, it is similarly incapable of being turned into legitimate public action.[4]

4. Contrary to the suggestion of amicus NEA (NEA Br. 19), many expressions of pure opinion—such as a statement that "I disagree with the President's policies"—will assist the public in evaluating a public official's performance. Such opinions (like votes) provide information concerning the intensity of the social consensus that exists (or does not exist) on a particular issue or administration. But opinions do not provide such information when the issue they address cannot be turned into legitimate public action—such as

Accordingly, such expression does not address "matters of public concern," as those words have been used in this Court's First Amendment decisions. See Bork, *Neutral Principles And Some First Amendment Problems,* 47 Ind. L.J. 1, 31-35 (1971) (expression favoring the overthrow of the government or violation of law is not political speech, even where the desired action is not imminent, because it favors the damage and destruction of the very processes our Constitution establishes for discovering and spreading political truth); A. Bickel, *The Morality of Consent* 62-79 (1975).

Of course, "[t]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political" (*Mine Workers v. Illinois Bar Ass'n.*, 389 U.S. 217, 223 (1967)). Thus, in contending that respondent's speech does not touch upon "a matter of public concern," we do not suggest that her words are "totally beyond the protection of the First Amendment," or that they fall into "one of the narrow and well-

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whether to assassinate the President. In these rare cases, the opinion provides no information usable by the voting public.

Likewise, there is no merit in the suggestion of respondent and amicus NEA (Resp. Br. 28-29; NEA Br. 16-17, 19-20) that the analysis proposed here invites the Court to engage in some new and illegitimate form of judicial censorship. As noted in text, this Court has long treated the classification of expression as a legitimate part of the judicial function. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, slip op. 8-11; *FCC v. Pacifica Foundation*, 438 U.S. 726, 742-748 (1978) (opinion of Stevens, J.) (same); *Chaplinsky v. New Hampshire*, 315 U.S. at 572. Exercise of that function routinely requires consideration of the "content" of the speech in issue. See *New York v. Ferber*, 458 U.S. 747, 754 (1982); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66-71 (1976) (opinion of Stevens, J.). And it occasionally, albeit rarely, requires consideration of the speaker's viewpoint. See, *e.g., Parker v. Levy*, 417 U.S. 733 (1974) (upholding statute which prohibited members of the armed forces from making speeches which "bring discredit upon the armed forces").

defined classes of expression which carries so little social value * * * that the State can prohibit and punish such expression by all persons in its jurisdiction" (*Connick v. Myers*, 461 U.S. at 147). As the court of appeals observed (Pet. App. 34a), "[a] state would * * * face considerable constitutional obstacles if it sought to criminalize the words that were uttered by [respondent] on the day the President was shot."[5] But "the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general' " (*Connick v. Myers*, 461 U.S. at 140, quoting *Pickering v. Board of Education*, 391 U.S. at 568). Under *Connick*, a public employee may be discharged without a judicial weighing of First Amendment and governmental interests when the employee's expressive activity addresses "matters only of personal interest." Respondent's statement that she genuinely hoped that the President would be assassinated is just such private expression.[6]

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5. Thus, contrary to the suggestion of respondent (Resp. Br. 22-24), *Watts v. United States*, 394 U.S. 705 (1969), does not bear on the argument advanced here. The *Watts* Court decided only that the utterance at issue in that case was not a "threat" within the meaning of 18 U.S.C. 871(a), a statute that criminalizes knowing and willful "threats" on the life of the President. The *Watts* Court had no occasion to decide, and thus did not decide, whether Mr. Watts' remark addressed a "matter of public concern." Nor did the Court decide whether, if Mr. Watts had been employed by a public law enforcement agency, the government could have discharged him for stating that, if drafted, "the first man I want to get in my sights is L.B.J." (394 U.S. at 706).

6. Amicus NEA errs in suggesting (NEA Br. 7-9, 10) that this Court has held that public employees may not be discharged for expressing approval of the use of violent force or violation of major criminal laws. The cases amici NEA cites (see *United States v. Robel*, 389 U.S. 258, 262-266 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 606-610 (1967); *Elfbrandt v. Russell*, 384 U.S. 11, 16-19 (1966); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 285-288 (1961)) involved regulatory schemes which, among other

5. Even assuming, however, that respondent's remark touched on a "matter of public concern," it is clear that the governmental interest that the Constable sought to promote by discharging respondent outweighs whatever First Amendment interest she has in expressing her wish for the assassination of the President while on the job. Respondent does not advance any convincing argument to the contrary.

Respondent first misstates the governmental interest that the Constable sought to promote by discharging her. The Constable did not discharge respondent out of mere disenchantment with her views. Resp. Br. 33-34. Nor did he discharge her simply because he lacked confidence that someone with respondent's views could be trusted to use a typewriter. NEA Br. 20-22. Rather, the Constable discharged respondent to ensure that his Office's reputation and appearance of being fully committed to enforcement of the law would not be impaired. Thus, when asked if respondent's continued employment "with her known views of wanting the President assassinated" would "impair the workings of [his] office" (Feb. 14, 1983 Tr. 69), the Constable testified that "all agencies and people would lose complete confidence in our office and upon me. I think our credibility would be destroyed."

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things, prohibited employees from belonging to organizations in which *other* individuals had at some time advocated the use of violent force or the violation of major criminal laws. The Court held that those regulatory schemes were unconstitutionally vague and overbroad because they might discourage public employees from engaging in protected political association. See *Connick v. Myers*, 461 U.S. at 144-145 ("The issue [in those cases] was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.'"). There is and can be no similar vagueness or overbreadth challenge here. See *Arnett v. Kennedy*, 416 U.S. 134, 158-164 (1974); *Cole v. Richardson*, 405 U.S. 676, 677-678, 681-686 (1972).

Ibid. The district court accepted this testimony as the true and correct reason for respondent's discharge. See Pet. App. 7a, 10a, 25a.[7]

Having misstated the governmental interest that motivated the Constable, respondent understandably fails to appreciate why the Constable did not consider the "ministerial" nature of her duties as a dispositive factor in determining whether or not to discharge her. A law enforcement agency may properly insist that its employees refrain from espousing approval of violations of the law in order to promote public respect for, and voluntary compliance with, the laws the agency is charged with enforcing. Cf. *Olmstead v. United States,* 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). *Every* employee of the agency is responsible for assisting it in the achievement of this objective.

A law enforcement agency's effectiveness would clearly be undermined if every employee holding a "lowly job" were at liberty to undercut the message that the agency is responsible for sending to the public. Thus, as amicus NEA concedes (NEA Br. 21), a "white supremacist might constitutionally be denied a job as an equal employment counsellor, and one who believes that incarceration is morally wrong might be denied a job as a prison guard." Likewise, as the Solicitor General points out (U.S. Br. 27-28), the Internal Revenue Service should not be required to employ someone who advocates tax fraud, and a draft board should not have to employ someone who insists on flaunting expletives concerning the draft. And, contrary to respondent's suggestion (Resp.

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7. We are therefore at a loss to understand amicus's claim (NEA Br. 23) that "[t]he Constable did not purport to fire [respondent] because her remark threatened public confidence in the agency."

Br. 38), we think that the FBI should be entitled to discharge any employee who expresses approval of the assassination of civil rights leaders or other public figures. In each of these situations, it should be irrelevant how lowly or elevated the employee's job description may sound; both the public and the agency's other employees will take the laws the agency is charged with enforcing less seriously if they know or have reason to believe that the agency employs persons who favor the violation of those laws.[8]

This governmental objective is not, as respondent and amicus NEA imply (Resp. Br. 39-41; NEA Br. 27-29), the equivalent of requiring all public employees to take a vague oath of "loyalty to the Government." The Constable has not required respondent or any other employee affirmatively to express support for any abstract governmental principle or creed. He has simply required that they refrain from expressing their approval of violent crime while working for his law enforcement agency. Such a prohibition is clearly constitutional.[9]

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8. The brief of amicus NEA reflects (Br. NEA 24-27) a fundamental lack of appreciation for a law enforcement agency's interest in fostering public respect for and voluntary compliance with the laws. The public can lose respect for those laws whether or not a remark can "reasonably be interpreted to suggest that [an individual] wishe[s] to interfere in any way with the ability of the [agency] * * * to carry out its public mission" (*id.* at 25). It can lose respect for those laws even it understands that an individual, "as a CRT operator, [is] in [no] position to harm the mission of the agency" (*id.* at 25). And it can lose respect for those laws even if the agency announces that it remains committed to that function. See *id.* at 26-27. In each case, by retaining an employee who expresses approval of violations of laws that the agency is charged with enforcing, the agency teaches by its toleration that the laws it is supposed to enforce are not all that important.

9. *Branti v. Finkel*, 445 U.S. 507 (1980), and *Elrod v. Burns*, 427 U.S. 347 (1976), are not to the contrary. *Branti* and *Elrod*

Thus, contrary to the argument of respondent and amicus NEA (Resp. Br. 32-34, 36-37; NEA Br. 24-25), the Constable had a reasonable basis for concluding that respondent's continued employment would impair the reputation and appearance of his Office. As the district court concluded, the Constable "does a great deal of work with the public" (Pet. App. 25a). People "would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed," if he retained an employee who "espouse[d] the assassination of any president, judge, or other public official" (*id.* at 7a). Under this Court's precedents, the Constable did not have "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships [were] manifest before taking action" (*Connick v. Myers*, 461 U.S. at 152). Cf. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, No. 84-312 (July 2, 1985), slip op. 21 ("Government need not wait until havoc is wreaked to restrict access to a nonpublic forum"); *Perry Education Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 52 n.12 (1983) (same). Rather, he was entitled to act on his quite reasonable beliefs.[10]

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hold only that a public employee's political beliefs or party affiliation must be related to the effective performance of the public office involved if they are to be a basis for her discharge. Here, respondent's expressed desire for the assassination of the President is inconsistent with the effective performance of the public office of which she is a part. Thus, *Branti* and *Elrod* in fact support the position that we have taken here.

10. Amicus NEA's suggestion (NEA Br. 27) that, prior to discharging an employee for engaging in such expressive activity, a public agency must take a Gallup-type poll concerning the speech's effect on public perceptions is preposterous. An agency would not promote its reputation and appearance by publicizing the imprudent actions and behavior of its employees. To the contrary, by doing so, the agency would simply intensify the very adverse effects it is

Against the Constable's interest in maintaining his office's reputation and appearance must, of course, be balanced respondent's First Amendment interest in speaking the words she spoke. See *Connick v. Myers,* 461 U.S. at 142; *Pickering v. Board of Eduction,* 391 U.S. at 568. But, having failed to acknowledge that the Constable was motivated by a legitimate concern for his office's reputation and appearance, respondent makes no attempt to weigh the competing interests in this case. We rest, therefore, on the discussion in the Solicitor General's brief (U.S. Br. 24-26), which shows that respondent's trivial First Amendment interest in expressing her desire for the assassination of the President while on the job is easily outweighed by the Constable's interest in maintaining the reputation and appearance of his office.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

MIKE DRISCOLL
County Attorney

BILLY E. LEE
Assistant County Attorney

Attorneys for Petitioners

MARCH 1987

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attempting to avoid by discharging the employee. And, in any event, this Court has indicated that the determination concerning how to minimize the adverse effects of undesirable behavior should be left to the responsible agency's judgment; it is not a matter for courts to decide. See *Posados de Puerto Rico Assoc. v. Tourism Co.*, No. 84-1903 (July 1, 1986), slip op. 14-15.

CERTIFICATE OF SERVICE

This is to certify that on this 10 day of March, 1987, I caused a signed true copy of the Reply Brief for the Petitioners to be placed in the United States Postal Service, with proper postage prepaid, addressed to counsel of record for respondent herein:

Bruce V. Griffiths, Esq.
1236 West Gray
Houston, Texas 77019

Alvin J. Bronstein, Esq.
David B. Goldstein
132 West 43rd Street
New York, New York 10036

Annie S. Garcy, Esq.
4848 Loop Central, Suite 800
Houston, Texas 77081

Lloyd N. Cutler
William R. Richardson, Jr.
Carl R. Johnston
Teresa D. Baer
2445 M Street, N.W.
Washington, D. C. 20037-1420

Billy E. Lee

BILLY E. LEE
Assistant County Attorney

(5)

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NO. 85-2068

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WALTER RANKIN,

Petitioner,

V.

ARDITH MCPHERSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION

WAYNE W. SCHMIDT,
Executive Director
JAMES P. MANAK,
General Counsel
Americans for Effective
Law Enforcement, Inc.
5519 N. Cumberland Ave.
Chicago, Illinois 60656

DAVID CRUMP
c/o The Legal Foundation
America
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICI CURIAE 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT AND AUTHORITIES 3

THE EMPLOYEE'S ON-DUTY STATEMENT IN THIS CASE, ADVOCATING THE CRIME OF MURDER, WAS NOT THE KIND OF EXPRESSION ON A MATTER OF "PUBLIC CONCERN" THAT WOULD OVERCOME THE LEGITIMATE CONCERNS OF HER EMPLOYER IN A LAW-ENFORCEMENT OFFICE 3

A. Statements That Merely Have Private Shock Value, and That Have No Possibility of Advancing Discussion of Any Public Issue Whatsoever, Cannot Be Characterized as Expression on "Matters of Public Concern" 4

B. A Statement Made By a Law Enforcement Employee During Working Time, Made to a Captive Audience While the Employee is on Duty and Performing Tasks Required By the Employment, is of Greater Concern to the Law Enforcement Employer Than an Off-Duty Statement 6

C. While Law Enforcement Employees Clearly Have the Protection of the First Amendment, They Do Not Have the Kind of "Super First Amendment Status" That Respondent in Effect Claims For Them 11

D. The Fact That the Employee in This Case Was Not, Herself, a Law Enforcement Officer Should Not Exempt Her From Reasonable Policies Generally Applicable in the Law Enforcement Office in which She Worked 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Arnett v. Kennedy, 416 U.S. 134 (1974) 10
Bethel School District v. Fraser, 54 U.S.L.W. 5054 (U.S. S. Ct. Mar. 3, 1986) passim
Cantwell v. Connecticut, 310 U.S. 296 (1940) 6
Chaplinsky v. New Hampshire, 355 U.S. 568 (1942) 6
Cohen v. California, 403 U.S. 15 (1971) 6
Connick v. Myers, 461 U.S. 138 (1983) 3, 4, 6
Erzoznik v. Jacksonville, 422 U.S. 205 (1975) 8
FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 6
Hasenstab v. Board of Fire & Police Commrs, 389 N.E.2d 588 (Ill. App. 1979) 11
Kovacks v. Cooper, 336 U.S. 77 (1949) 8
Lehman v. Shaker Heights, 418 U.S. 298 (1974) 8
Marshall v. City of Atlanta, 614 F. Supp. 581 (N.D.J. 1984) 11
New York v. Ferber, 458 U.S. 747 (1982) 6
Perry Education Ass'n v. Perry Local Educators' Assn., 460 U.S. 37 (1983) 10
Pickering v. Board of Education, 391 U.S. 563 (1968) 4, 6, 11
Shewmake v. Board of Fire & Police Commrs, 390 N.E.2d 536 (Ill. App. 1979) 11
Ware v. Sayad, 676 S.W.2d 258 (Mo. App. 1984) 11
Watt v. Civil Service Board, 606 S.W.2d 274 (Tenn. 1980) 11
Yoggerst v. Hedges, 739 F.2d 293 (7th Cir. 1984) 5

STATUTES

Tex. Code Crim. Proc. Ann. art. 2.12 (Vernon Supp. 1986) 7
Tex. Code Crim. Proc. Ann. art. 2.13 (Vernon Supp. 1986) 7
Tex. Const. art. V sec. 18 7
52 Tex. Jur. 2d, *Sheriffs, Constables and Marshals* secs. 1-2 (1964) 7

SECONDARY AUTHORITIES

Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor,* 53 COLUM. L. REV. 960 (1953) 8

Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention,* **59 TEXAS L. REV. 477 (1981)** **9**

Redish, *The Value of Free Speech,* **130 U. PA. L. REV. 591 (1982)** **4**

NO. 85-2068

IN THE
SUPREME COURT OF THE UNITED STATES
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WALTER RANKIN,

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Respondent.

BRIEF OF AMICI CURIAE

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-eight times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA) is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

SUMMARY OF ARGUMENT

An utterance having only private shock value, which does not advance debate on any issue, is not speech on a "matter of public concern" within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983). Particularly when it takes place while an employee is on duty and performing tasks required by her employment, and while other employees are present as a captive audience, an utterance of this kind is of much greater concern to the employer. Amici recognize that employees in law enforcement offices have rights that are protected under the first amendment, and that these rights include protection of some kinds of speech that may criticize or embarrass their employers. However, employers should not be required to retain employees whom any private employer would terminate for job-related reasons. If they were required to do so, law enforcement employees actually would have a kind of "super first amendment status," which in effect is what Respondent claims for them. Finally, the fact that this employee was not a law enforcement officer herself should not prevent the employer from applying employment policies that he would apply uniformly throughout the office. There are many different kinds of civilian employees who have widely differing kinds of responsibilities in the law enforcement effort, and a police chief should not be reduced to guessing which ones—dispatchers, community relations personnel, evidence technicians, or persons with McPherson's precise duties—are constitutionally privileged to advocate murder while on the job.

ARGUMENT AND AUTHORITIES

THE EMPLOYEE'S ON-DUTY STATEMENT IN THIS CASE, ADVOCATING THE CRIME OF MURDER, WAS NOT THE KIND OF EXPRESSION ON A MATTER OF "PUBLIC CONCERN" THAT WOULD OVERCOME THE LEGITIMATE CONCERNS OF HER EMPLOYER IN A LAW-ENFORCEMENT OFFICE.

The court of appeals correctly recognized that *Connick v. Myers*, 461 U.S. 138 (1983) provides the framework for analysis of this case. Furthermore, that court correctly held: "We . . . agree that Constable Rankin's action in dismissing McPherson was based on an important and legitimate government interest." 786 F.2d at 1238. However, the court incorrectly held that her advocacy of the crime of murder, even though in the form of "an actual wish for . . . assassination", was "addressed to serious matters of public concern." *Id.*

A. Statements That Merely Have Private Shock Value, and That Have No Possibility of Advancing Discussion of Any Public Issue Whatsoever, Cannot Be Characterized as Expression on "Matters of Public Concern".

McPherson's statement contributed nothing to any public debate on any issue. Indeed, it was deliberately phrased to have nothing to do with any public debate. It certainly could not have been calculated to persuade anyone concerning any issue, public or private. To frame the question in the terminology of *Connick v. Myers*, amici submit that "Publication of [McPherson's] remark would provide no basis for determining [any person's] qualifications for continuing in public office." *Connick v. Myers*, 461 U.S. at 1690; *Pickering v. Board of Education*, 391 U.S. 571-72 (1968).

The only possible motivation for this statement was to give vent to anger. That is a private purpose,[1] not a "serious matter

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1 In a private context, speech may serve many purposes. For public purposes, "It has been urged that an important function of free speech is to enhance the potential of individual contribution to the social welfare." *See* Redish, *The Value of Free Speech*, 130 U. Pa. L. Rev. 591, 593 (1982). In some contexts, amusement, introspection, or even completely noncommunicative cursing (short of obscenity or "fighting words") might serve *private* purposes that could be considered to be within the broad protection of "speech." However, the *Connick* framework does not consider these *private* purposes, because employers obviously should not be required to consider them in the work environment.

of public concern." Furthermore, a law enforcement office is the last place on earth where actions or utterances produced solely by uncontrolled temper should be encouraged. Law enforcement employees simply must be able to avoid lashing out at persons who frustrate them, who may range from arrested persons to courtroom litigants to public officials.[2] The remark in this case served the same private purpose for the speaker as verbal abuse of an arrestee would.

The decisions of this court clearly indicate that remarks having merely private shock value cannot appropriately be labeled as "serious matters of public concern." For example, in *Bethel School District v. Fraser*, 54 U.S.L.W. 5054 (U.S. S. Ct. Mar. 3, 1986), the court held that an offensive speech, inconsistent with the mission of the institution, was not protected speech when given by a high school student at a school assembly. That was so, even though the student mentioned a candidate for office, and even though his speech might have been protected as dealing with "public concern" if he had not chosen to abandon that purpose and, instead, merely shock and offend.

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2 Furthermore, the fact that an employee lashes out at an individual, whether a public or private figure, does not convert her remarks into "matters of public concern." "It does not follow . . . that [the employee's] statement can be characterized as speech on a matter of public concern just because such a concern provided the impetus for speaking." *Yoggerst v. Hedges*, 739 F.2d 293 (7th. Cir. 1984). The truth of the matter is that most frustrations that prompt angry utterances by individuals involve issues that other individuals somehow also recognize, and thus sufficiently tortuous reasoning could link almost any such utterance to a "public" issue in some remote way. For example, a jailer who verbally abuses a prisoner can claim that his behavior is somehow related to bad working conditions. A governor's aide who shouts obscenities, waves his arms, and disrupts a legislative meeting, might say that frustration with other individuals' positions on public issues is the cause of his remarks. But surely these individuals could not avoid discipline on these grounds. The court of appeals' effort to distinguish *Yoggerst v. Hedges*, *supra*, in this case is completely unpersuasive.

In its opinion in *Fraser*, the Court also quoted the Manual of Parliamentary Practice drafted by Thomas Jefferson and adopted by the House of Representatives, prohibiting the use of "impertinent" speech during debate.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the court dealt with the power of the Federal Communications Commission to regulate a radio broadcast in which a comedian described his own performance as being in "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say ever." *Id.* at 729. Although public discussion of the practices, customs, and morals exhibited in contemporary radio broadcasting clearly would be protected by the first amendment, the plurality of the Court held that the "dirty words" spoken in that case were not. Its opinion said: "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." These words (which fit the present case perfectly) were quoted from *Chaplinsky v. New Hampshire*, 355 U.S. 568, 572 (1942), which held that "insulting or 'fighting' words" are not expressions on serious matters of public concern. *Cf. New York v. Ferber*, 458 U.S. 747 (1982); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (carving out "personal abuse" as unprotected) (by implication). Finally, in *Cohen v. California*, 403 U.S. 15 (1971), a sharply divided court upheld the right to express an anti-draft viewpoint in a public place in terms highly offensive to most citizens, but indicated that a different context (and, more importantly, a narrowly drawn statute, since *Cohen* was a criminal case) would make a difference. This case involves that different context, in that it involves the work environment and is subject to *Connick-Pickering* considerations.

B. A Statement Made By a Law Enforcement Employee During Working Time, Made to a Captive Audience While the Employee is on Duty and Performing Tasks Required By the Employment, is of Greater Concern to the Law Enforcement Employer Than an Off-Duty Statement.

Police officers have rights of association, too. This right has a first-amendment dimension.[3] Furthermore, the right to speak includes the right not to listen. Constable Rankin was entitled to consider the fact that employees in his office are a captive audience for other employees, with whom they work side by side. The lower court recognized the "important and legitimate government interest" in "Constable Rankin's contention that he should not have to employ *anyone* who 'rides with the cops and cheers for the robbers' ",[4] 786 F.2d at 1238. What the court of appeals failed to recognize was that all personnel in the

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3 Obviously, the police officer's associational rights are limited. The officer would have no cognizable right to avoid association with members of the public, arrestees, or numerous others whom their employment required, merely because he or she might prefer not to deal with a given individual. But officers clearly have an interest in not being saddled with fellow officers or employees who deliberately shock and disgust them, such as those who "cheer for the r bers." An employer like Constable Rankin has a right to consider this interest, and he should be able to consider that it has first amendment dimensions.

4 Constables in Texas (and many other states) are constitutional law enforcement officers. Tex. Const. art. V sec. 18. Their duties are similar to those of a sheriff: to "make arrests" with or without warrants, "to execute and return according to law all process", and to perform other duties of a peace officer. 52 Tex. Jur. 2d, *Sheriffs, Constables and Marshals* secs. 1-2 (1964). The arrest powers of a constable or deputy extend throughout the State of Texas. *Id. See also* Tex. Code Crim. Proc. Ann. art. 2.12 (Vernon Supp. 1986) (constables are peace officers with authority similar to that of sheriffs, city police officers, Texas Rangers, and like persons).

Constables in Harris County, Texas (where this case arose) vary from precinct to precinct in their precise duties. In some locations, they furnish traditional patrol service, much as a metropolitan police force would do; they are the police force for those areas. Furthermore, their authority as peace officers is important in every precinct when they perform such duties as arresting suspects, evicting persons (which can be a dangerous task), seizing property to satisfy judgments (again, often a surprisingly dangerous task), taking persons into custody on mental health warrants, and detaining juveniles. Furthermore, "It is the duty of every peace officer to preserve the peace . . . ", Tex. Code Crim. Proc. art. 2.13 (Vernon Supp. 1986), and deputy constables have this duty even outside normal working

office, from Constable Rankin on down, had a *first amendment* interest to that effect. *See also Bethel School District v. Fraser, supra* (teenage girl students had a valid interest in avoiding treatment as captive audience during speech that, "[b]y glorifying male sexuality, . . . was acutely insulting"); *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975) (rights of listener become particularly important when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure"); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (bus riders can be protected from involuntary exposure to political advertising); *Kovacks v. Cooper*, 336 U.S. 77 (1949) (freedom of speech protects efforts to reach the minds of "willing listeners"; "[t]o enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself"); Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 Colum. L. Rev. 960 (1953).

Furthermore, Constable Rankin had a legitimate interest in the effects of an employee's remarks that denied the most basic purposes of his office, made for anyone to hear, particularly because it occurred during working hours and while the employee was on duty. In this regard, the lower court seriously misapprehended the issue. Perhaps the most uncareful statement by the court of appeals is its conclusion that "the evidence did not show that the remark threatened the future efficiency or morale of the office." 786 F.2d at 1238. The court of appeals ignored the reality that the projection of leadership, atmosphere, and tone of a law enforcement office are crucially important, although they may be difficult for a court of appeals to measure.

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hours, as do other peace officers. They are trained, commissioned, and required to carry firearms. The court of appeals' description of the nature of their duties as peace officers is unduly restrictive.

Although McPherson was not herself a commissioned officer with badge and firearm, her duties were intertwined with these kinds of functions in a way that made the proper discharge of commissioned constables' duties dependent upon the performance of those in her work area. *See* Part D of this brief, below. However, the Court's decision should not depend upon nice distinctions in the duties of this particular employee or this particular office in any event, for the reasons stated in Part D.

It is fortunate that this court has avoided the court of appeals' analysis of this "work environment" issue. In *Bethel School District v. Fraser, supra,* for example, the Court said:

> The first amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. . . . Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the people that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

Similarly, Constable Rankin's office had proper authority to disassociate itself from the utterances that would contradict its "basic . . . mission" in this case.

But there is something even more fundamentally wrong with the court of appeals' finding that there was no "disruption caused by [McPherson's] comment" and that the remark did not "[threaten] the future efficiency or morale of the office." 786 F.2d at 1238. A more perceptive analysis is given by Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention,* 59 Texas L. Rev. 477, 479-98 (1981):

> The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fist fights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. . . . The lack of knowledge about what really enables people to learn and about the complex interrelationship of the variables involved prevents courts

> from judging that no interference has taken place in the school. . . .

A more important concern in the law enforcement setting is the effect such an utterance may have on the discipline of law enforcement employees generally, not simply on the immediate situation. As Justice Powell explained in his separate opinion in *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974):

> [T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency.

It is not necessary for an "employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Perry Education Ass'n v. Perry Local Educators' Assn.*, 460 U.S. 37, 52 (1983).

In this regard, amici are proud that the modern law enforcement ideal—and in the overwhelming majority of cases, the actual practice—is courtesy toward those who provoke personal frustration, including the most repugnant arrested citizen. This court can take judicial notice, based upon widespread news reports, of the professionalism that New York City detectives displayed when they arrested David Berkowitz (who designated himself as the "Son of Sam"), or that displayed by Houston police officers who dealt with mass torture-murderer Elmer Wayne Henley. While recognizing that the record is not perfect, amici emphatically submit that these examples of professionalism do not happen by accident. They happen because officers such as Constable Rankin promptly, habitually, and systematically

reject behavior such as McPherson's. By taking away their ability to do so, the court of appeals' opinion would decrease that professionalism if it were upheld.

C. *While Law Enforcement Employees Clearly Have the Protection of the First Amendment, They Do Not Have the Kind of "Super First Amendment Status" That Respondent in Effect Claims For Them.*

Amici agree with this court's view, expressed in *Pickering v. Board of Education*, 391 U.S. 563 (1968), that a public employee is free to voice criticism against his employer. Law enforcement personnel are also privileged to raise criticism. In Illinois, for example, one appellate court upheld a firefighter's right publicly to accuse the mayor of stealing an election. *Shewmake v. Board of Fire & Police Commrs*, 390 N.E.2d 536 (Ill. App. 1979). In another case, an Illinois appellate court upheld another firefighter who called an alderman a "dummy" in connection with a public issue. *Hasenstab v. Board of Fire & Police Commrs*, 389 N.E.2d 588 (Ill. App. 1979). Another picturesque (but unreported) case involved a Houston city employee who wrote a published letter referring to Mayor Louie Welch as "screwy Louie", was disciplined, and sued. He later accepted the city's offer of settlement.

Conversely, the courts have declined to extend first amendment protection to police officers and other public employees who, in a manner connected with their public duties, utter loud threats, *Watt v. Civil Service Board*, 606 S.W.2d 274 (Tenn. 1980), or use profanity, *Marshall v. City of Atlanta*, 614 F. Supp. 581 (N.D.J. 1984); *Ware v. Sayad*, 676 S.W.2d 258 (Mo. App. 1984).

The more than 20,000 police chiefs, sheriffs, and elected constables in this country expect that subordinates sometimes will exercise their first amendment rights in ways that embarrass or humiliate the administration, their superiors, and fellow officers. That kind of speech is protected. But these officers do not expect and will not tolerate subordinates who, while on

duty, cheerfully support or encourage the commission of violent crimes. Amici concede that a public employee can lawfully undermine morale when offering protected criticism. Amici suggest, however, that a law enforcement employee cannot lawfully undermine morale when, during working hours and on the job, speaking to other employees who must work beside her, she expresses a desire that a person should be murdered.

Ironically, an employee in a purely private business (one without the difficult public mission of a law enforcement office) obviously could be fired for behavior such as McPherson's. Amici expect that ACLU and McPherson will argue for affirmance on the stated ground that law enforcement employees have first amendment rights, an issue no one debates. In reality, however, ACLU's argument is that these employees have a kind of "super first amendment status": even in situations in which any private employer would dismiss the employee, based upon job-related concerns raised by her on-duty behavior, law enforcement agencies would be prohibited from using that sensible response. Again ironically, what ACLU actually argues for is lower performance standards for law enforcement employees. Persons who promptly would be disciplined for their harmful on-duty behavior in private employment may engage in precisely the same harmful on-duty behavior merely because they are law enforcement employees, even though employment-related reasons exist for their termination. The court should reject this "super first amendment status" advocated by McPherson and ACLU.

D. The Fact That the Employee in This Case Was Not, Herself, a Law Enforcement Officer Should Not Exempt Her From Reasonable Policies Generally Applicable in the Law Enforcement Office in which She Worked.

Civilian personnel often work in law enforcement offices. Often, their duties are fungible with those sometimes performed by the officers. Non-officer employees may include evidence technicians, laboratory personnel, radio dispatchers, clerk-typists, booking personnel, receptionists, victim-witness personnel, and persons fulfilling many other kinds of duties. It simply

would not be practical to subject police chiefs to constitutional damage actions depending upon finely-graded distinctions among these innumerable different types of civilian personnel, and to require the chiefs to guess which ones are subject to which constitutionally imposed policies. Constable Rankin should not be saddled with a constitutional responsibility to guess which categories of employees are constitutionally privileged to advocate murder while on the job.

In the first place, it is impossible to compartmentalize a given functionary so that he or she has no influence on law enforcement activities. If McPherson may perform her civil process job in the manner disclosed here, why not protect advocacy of murder by a radio dispatcher? Must Constable Rankin retain a radio dispatcher who "dispatches for the cops, but cheers for the criminals'"? In the second place, a civilian employee like McPherson has great influence in the way that the rights and interests of citizens are protected. McPherson's responsibilities could determine records concerning whether citizens have warrants out for their arrests, or whether they are subject to eviction, or whether their civil papers have been served. Must citizens who deal with non-officer employees on these matters involuntarily hear a speech advocating criminal conduct? Finally, the court of appeals' opinion fails to recognize that police chiefs are like any other kind of employer in that they wish for, and deserve, the kind of employees they will want to retain and promote. They hire persons in McPherson's position whom they will promote to supervisory positions after service of five, ten or twenty years. They hope to see these employees having positive influence on other employees.

Of course, these responsible, positive employees are initially hired as probationary employees, in positions where their responsibility for public contact is minimal. The court of appeals failed to recognize that McPherson was likely to have limited responsibilities, which should be expected to expand. The court of appeals' reasoning would condemn law enforcement officers to retain precisely those employees who showed the least promise of serving the public well in important law enforcement capacities—and, in fact, even to promote such individuals as

McPherson on a "nondiscriminatory" basis, as obviously would be necessary, if her conduct, here, is considered to be protected by the first amendment.

CONCLUSION

The decision of the court of appeals should be reversed.[5]

Respectfully submitted,

David Crump
c/o The Legal Foundation of America
South Texas College of Law Building
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amici Curiae

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5 Amici express appreciation for the assistance of law student Jack Gillis in the preparation of this brief.

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No. 85-2068

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONSTABLE WALTER H. RANKIN, ET AL., PETITIONERS

v.

ARDITH MCPHERSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

LEONARD SCHAITMAN
GREGORY C. SISK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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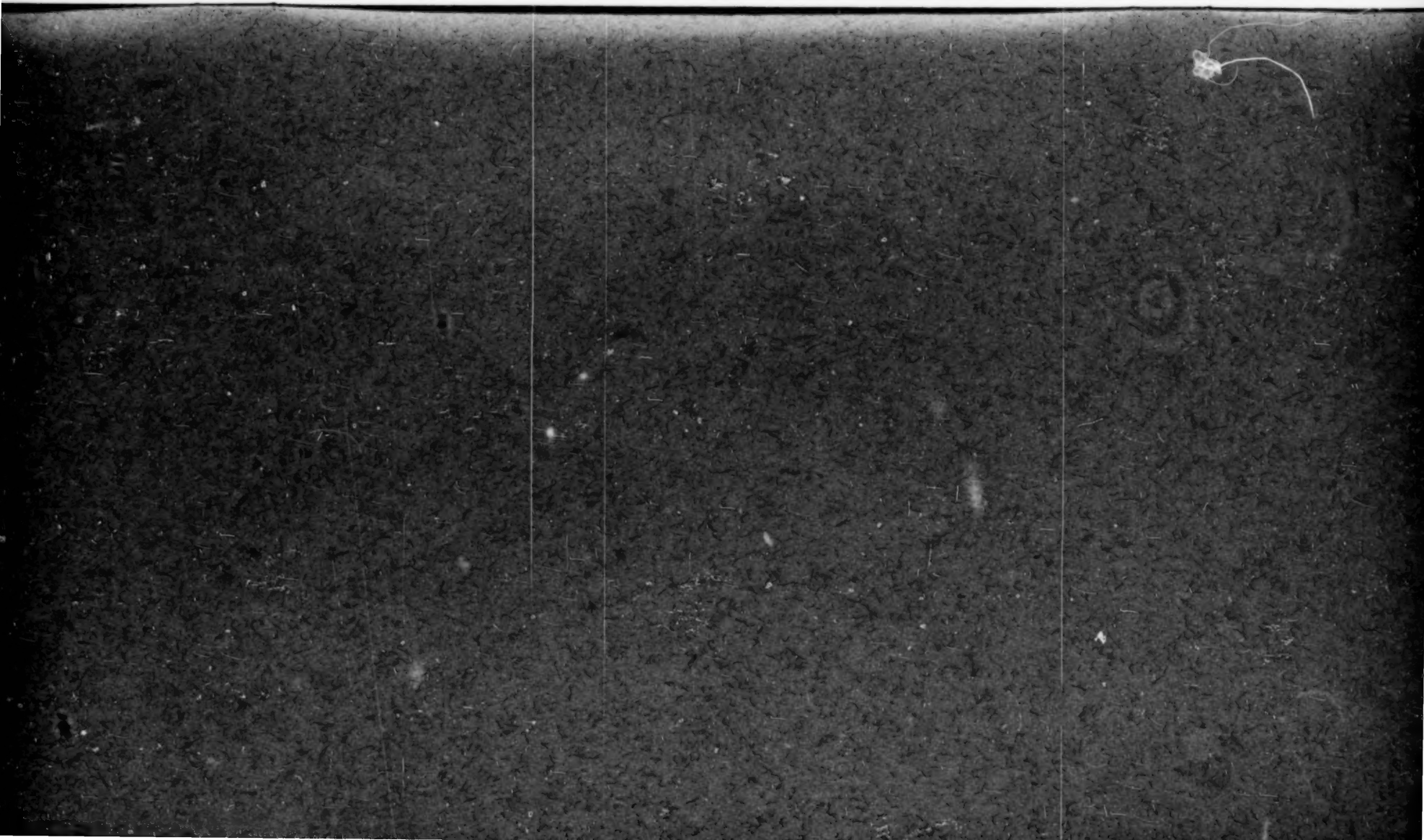

QUESTION PRESENTED

Whether the free speech components of the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing approval of, and a genuine desire for, the assassination of the President of the United States.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument:	
The court of appeals erred in holding that the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing her unflinching approval of and desire for the assassination of the President of the United States	9
A. Expression that approves of and genuinely desires the assassination of the President cannot fairly be characterized as speech on a matter of public concern	12
B. Even if respondent's expression could be regarded as speech on a matter of public concern, her discharge was nevertheless justified by legitimate countervailing interests of the law enforcement agency for which she worked	19
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Adler v. *Board of Education*, 342 U.S. 485 (1952) 9
Arnett v. *Kennedy*, 416 U.S. 134 (1974) 20, 21, 22, 27
Beauharnais v. *Illinois*, 434 U.S. 250 (1952) 12
Bose Corp. v. *Consumers Union of Unites States, Inc.*, 466 U.S. 485 (1984) 19
Cafeteria Workers v. *McElroy*, 367 U.S. 886 (1961) 10
Cantwell v. *Connecticut*, 310 U.S. 296 (1940) 17
Carey v. *Brown*, 447 U.S. 455 (1980) 15
Chaplinsky v. *New Hampshire*, 315 U.S. 568 (1942) 12, 17
Civil Service Commission v. *Letter Carriers*, 413 U.S. 548 (1973) 21, 22, 27
Cohen v. *California*, 403 U.S. 15 (1971) 17, 18, 27
Cole v. *Richardson*, 405 U.S. 676 (1972) 22
Connick v. *Myers*, 461 U.S. 138 (1983) ..... *passim*
Cramp v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) 22
Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985) 13, 14, 15, 16, 18

Page

Cases – Continued:

First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978) 12, 17
Frohwerk v. *United States*, 249 U.S. 204 (1919) 16
Garner v. *Los Angeles Board*, 341 U.S. 716 (1951) 9
Garrison v. *Louisiana*, 379 U.S. 64 (1964) 13, 16
Gasparinetti v. *Kerr*, 568 F.2d 311 (3d Cir. 1977), cert. denied, 436 U.S. 903 (1978) 21
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) 18, 24, 25
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 17
Janusaitis v. *Middlebury Volunteer Fire Dep't*, 607 F.2d 17 (2d Cir. 1979) 21
Keyishian v. *Board of Regents*, 385 U.S. 589 (1967) 10, 22
McAuliffe v. *Mayor of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892) 10
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 12
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 14
New York v. *Ferber*, 458 U.S. 747 (1982) 12
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) 19, 25
Olmstead v. *United States*, 277 U.S. 438 (1928) 23
Philadelphia Newspapers, Inc. v. *Hepps*, No. 84-1491 (Apr. 21, 1986) 13
Pickering v. *Board of Education*, 391 U.S. 563 (1968) ... 10, 13, 16, 18, 20, 21, 25
Roth v. *United States*, 354 U.S. 476 (1957) 12, 16
Snepp v. *United States*, 444 U.S. 507 (1980) 21, 22
Virginia Pharmacy Bd. v. *Virginia Consumer Council*, 425 U.S. 748 (1976) 12, 14
Watts v. *United States*, 394 U.S. 705 (1969) 17, 19
Wieman v. *Updegraff*, 344 U.S. 183 (1952) 10, 22
Yoggerst v. *Hedges*, 739 F.2d 293 (7th Cir. 1984) 16-17

Constitution, statutes, and regulation:

U.S. Const.:
Amend. I ..... *passim*
Amend. XIV 4, 10, 11

Page

Constitution, statutes, and regulation—Continued:

Lloyd-LaFollette Act, 5 U.S.C. 7501 21
18 U.S.C. 871(a) 3, 16, 19, 26
42 U.S.C. 1983 4
5 C.F.R. 735.201a 21-22

Miscellaneous:

Developments in the Law, Public Employment, 97 Harv. L. Rev. 1611 (1981) 22

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2068

CONSTABLE WALTER H. RANKIN, ET AL., PETITIONERS

v.

ARDITH MCPHERSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether a public law enforcement agency may discharge an employee for speaking out in favor of violent criminal acts. The United States is the Nation's largest public employer, and the Justice Department is the Nation's largest law enforcement agency. Because the Court's resolution of the question presented will apply to the federal government, the United States has a substantial interest in the outcome of this case.

STATEMENT

1. Petitioner Walter Rankin is the Constable for Precinct One in Harris County, Texas. He was first elected to that position in 1965 on the Democratic Party ticket (Pet. App. 36a; J.A. 55, 57, 63, 75). As Constable for Precinct One, petitioner is responsible for monitoring and serving process in all civil and criminal misdemeanor cases in Harris County (Pet. App. 37a; J.A. 60-61). He is also responsible for serving process on and occasionally arresting juveniles; for executing warrants on persons being

involuntarily committed to mental health institutions; and for providing transportation and security to visiting dignitaries and government officials (Pet. App. 37a; J.A. 61-64, 67-70, 90-93). Petitioner deems himself authorized to carry out any law enforcement function necessary to aid the citizenry that elected him (J.A. 62, 70).

Petitioner employs approximately 80 persons to assist him with his duties (Pet. App. 36a). Some of these persons have been commissioned as "peace officers" pursuant to a statewide procedure (J.A. 70-72). As peace officers, they may assist petitioner in serving process, executing warrants, and providing security to visiting officials (Pet. App. 37a). Others have not been commissioned as peace officers and may perform only clerical functions for petitioner (*ibid.*). Under Texas law, however, all of petitioner's employees, regardless of job function, are designated as Deputy Constables and must take the prescribed oath of office (*id.* at 6a). As a Deputy Constable, each employee is authorized to act as petitioner's "true and lawful deputy, to do and perform any and all acts and things pertaining to the office of said Constable" (*id.* at 5a).

Petitioner appointed respondent Ardith McPherson as a Deputy Constable on January 14, 1981, for a 90-day probationary term (Pet. App. 4a). Since respondent was not a commissioned peace officer (*id.* at 37a), she was assigned to operate a computer terminal in the office, where she monitored the progress of civil summonses issued in the precinct (*id.* at 4a-6a). As part of this job, respondent occasionally had to answer the telephone and to respond to information requests of attorneys visiting the office (*id.* at 13a n.1; J.A. 78-79).

On March 30, 1981, respondent and several other Deputy Constables were working at their computer terminals when they heard that the President had been shot (Pet. App. 24a). This report prompted respondent to

engage a co-worker in a brief discussion of the President's economic and social policies, with which respondent strongly disagreed (*id.* at 6a, 13a, 40a). Respondent concluded this discussion by stating that the assassination attempt had to "happen sooner or later" (Jan. 21, 1985 Tr. 73) and that, "[i]f they go for him again, I hope they get him" (Pet. App. 23a, 32a).

A senior Deputy Constable employed by petitioner overheard respondent's remark (Pet. App. 30a). Already stunned by the news of the assassination attempt (Jan. 21, 1985 Tr. 54), the senior Deputy Constable said to respondent, "[S]urely you don't mean that" (*id.* at 56). Respondent made no effort to disarm the senior Deputy Constable's concern (*id.* at 56, 75, 93; J.A. 80). As a consequence, the senior Deputy Constable reported the incident to his superior, who in turn reported the incident to petitioner (Pet. App. 6a, 32a; J.A. 79-82).

Petitioner immediately summoned respondent to his office (Pet. App. 6a, 32a; J.A. 82). There, he asked respondent whether she had expressed her approval of and desire for the assassination of the President (Pet. App. 6a-7a). Respondent confirmed that she had done so (*ibid.*; J.A. 82-83). Petitioner then asked respondent whether she "meant" what she said (Pet. App. 7a, 14a n.3). Respondent replied, "I sure do" (*id.* at 7a, 32a; J.A. 82-84). Petitioner promptly "lost all confidence" that respondent was fit to be a Deputy Constable in his law enforcement agency and discharged her (Pet. App. 7a, 24a-25a; J.A. 83, 103). Respondent at the time was still a probationary employee, having been on the job only ten weeks and having two weeks of her probationary period left (Pet. App. 4a, 13a n.1).

Petitioner reported to the Secret Service the fact that respondent had indicated she would approve of the assassination of the President. Pet. App. 24a-25a; J.A. 83-84. See 18 U.S.C. 871(a) (making certain threats on the

President's life a crime). In accord with its customary policy, the Secret Service sent two agents to respondent's house to investigate the incident (Jan. 21, 1985 Tr. 80). The agents asked respondent to provide them with handwriting samples and permission to verify that she had never been committed to a mental health institution (*id.* at 81). Respondent cooperated with the agents and they did not contact her again (*id.* at 81-82).

2. Respondent subsequently filed this 42 U.S.C. 1983 action against the Constable and Harris County in United States District Court, alleging that her discharge violated the free speech components of the First and Fourteenth Amendments (Pet. App. 32a; J.A. 9-10). The court granted summary judgment in favor of petitioners. It first found that respondent's "comment in no way served the public's interest in matters of general concern" (Pet. App. 10a). It then found that the "Constable's office maintains a strong interest in retaining only those deputies who possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement" (*id.* at 11a). The court concluded that "[i]t was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as [respondent's], at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement decisions" (*ibid.*). Thus, it held that respondent's "First Amendment rights were not violated by her discharge" (*ibid.*).

The court of appeals vacated and remanded for further factual findings (Pet. App. 12a-30a). It found that substantial issues of material fact remained concerning the " 'content, form, and context' " of respondent's expression (*id.* at 17a, quoting *Connick* v. *Myers*, 461 U.S. 138, 147-148 (1983)). The court concluded that these factual uncertainties made the grant of summary judgment to petitioners improper (Pet. App. 20a). In particular, the

court emphasized that the district court should determine "whether [respondent] admitted to the Constable that she seriously meant what she said rather than spoke in political hyperbole" (*ibid.* (footnote omitted)).

3. After conducting a full trial on remand (Pet. App. 21a-27a), the district court held that respondent's remark was "something more than political hyperbole" (*id.* at 25a). Noting that respondent had "conceded having said those words * * * and [having] made no attempt to retract them," the court found that respondent's words "expressed such dislike of a high public government official as to be violent words, in context" (*id.* at 23a, 25a). The court then reaffirmed its earlier determinations that "Constable Rankin [was] very concerned about the character and trustworthiness of the people in his office, as he is certainly entitled to be" (*id.* at 25a), and that respondent's statement had "indicate[d] to him [that] she was the kind of person who would be a * * * negative influence in the office" (*ibid.*). The court further noted that the Constable "does * * * a great deal of work with the public [such that] [i]f the people he hires mistreat the public, disappoint the public, [or] insult the public, [he] is not going to get reelected" (*ibid.*). Employing a "balancing test" derived from this Court's decisions, the court then determined that "Constable Rankin's right to promote the efficiency of the public service through his employees" outweighed respondent's right "to say, if they go for him again, I hope they get him" (*id.* at 26a).

4. The court of appeals reversed (Pet. App. 29a-42a). It found that "the record supports the district court's conclusion that [respondent] expressed an actual wish for the assassination of the President" (*id.* at 39a) and that she was not discharged merely "for expressing disapproval of the President's policies" (*id.* at 36a & n.1). Although the court viewed respondent's statement as "repulsive, nigh obscene," it found that she had not been fired "solely for the disgusting manner of her expression" (*id.* at 35a).

Rather, it concluded that she "was undoubtedly fired because of the *content* of her speech," that is, "because she honestly hoped that any future assassination attempt would be successful" (*id.* at 36a (emphasis in original)). On that basis, the court held that respondent's remark deserved the highest degree of First Amendment protection because "it was evoked by and addressed to serious matters of public concern," to wit, "the life and death of the President" (*id.* at 40a, 36a).

Applying this Court's decision in *Connick* v. *Myers*, 461 U.S. 137 (1983), the court of appeals then undertook to balance "the value of protecting [respondent's] right to express her opinion, however loathsome, * * * against the competing interests of the constable's office in the effective and efficient fulfillment of its law enforcement responsibilities" (Pet. App. 40a). The court agreed that "Constable Rankin's action in dismissing [respondent] was based on an important and legitimate government interest" (*id.* at 40a-41a), specifically, "that a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination" (*ibid.*). It found, however, that respondent's "potential for undermining the office's mission [was] trivial" (*id.* at 42a). The court noted that respondent "was one of about dozen clerk-typists working in a closed room" (*ibid.*), that "[s]he was not a law enforcement officer and she had none of the discretion or power associated with that position" (*ibid.*), that "[h]er job did not bring her into contact with the public" (*ibid.*), and that she did not have "any access to sensitive or important files" (*ibid.*). "Were any of these factors different," the court said, "we would have a different case." But since there was no "evidence that [this] government employee's views [were] inconsistent with the mission of the employing agency *and* with the employee's role in that agency (*ibid.* (emphasis in original)), the court held that "tolerance [was] required."

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the free speech components of the First and Fourteenth Amendments of the Constitution preclude this public law enforcement agency from discharging respondent for expressing her unflinching approval of and unabashed desire for the assassination of the President of the United States. That holding rests on the false premise that respondent's expression relates to a "matter of public concern." And even if that premise were accepted, respondent's discharge was justified by the Constable's substantial interest in not employing persons who express their approval of acts that would constitute major violations of the criminal law.

A. Under this Court's precedent, the free speech components of the First and Fourteenth Amendments limit the conditions a public employer may place on its employees' expressive activities only to the extent that those employees, by their expressive activities, are addressing a "matter of public concern." Expressive activity does not address a "matter of public concern," however, unless, when viewed in terms of its "content, form, and context," it contributes to a dialogue in which the body politic has a rational and legitimate reason to engage. Respondent's remark concerning her approval of and unabashed desire for the assassination of the President does not contribute to any such dialogue. In terms of its "content," the remark expresses only respondent's personal and private desire that the President be removed from office by assassination; assassination is, however, a serious crime and a fundamentally intolerable means of promoting political change in our democratic order. Approval of such a serious crime is not a position which should be regarded as a matter within the range of publicly debatable propositions. In terms of "form," the remark is much like those forms of expression, such as fighting words and incitement to riot, that this Court has held are not worthy of

First Amendment protection at all. Finally, in terms of "context," respondent did not make her remark as part of any serious effort to participate in public dialogue; rather, it was an unprofessional statement made in office conversation and in a subsequent dispute with her employer. Accordingly, while we do not think that respondent's remark could be criminalized, we believe that it stands in the lower tier of First Amendment values. Respondent therefore is not entitled to resist her discharge from public employment by invoking the First Amendment.

B. In any event, even if respondent's remark were thought to relate to a "matter of public concern," the Constable was justified in discharging respondent for expressing it. A public employer may protect substantial governmental interests by placing reasonable conditions on its employees' right to engage in expressive activities, even when those expressive activities address matters of public concern. A law enforcement agency has a substantial interest in employing only those persons who possess and publicly manifest qualities that exemplify respect for law and for the high standards of law enforcement. Petitioner's refusal to employ a person who openly expressed her approval of and desire for the assassination of the President of the United States is a reasonable means of promoting that governmental interest. By making and refusing to retract a statement that she would approve of a violent criminal act, respondent gave the Constable substantial reason to believe that she did not possess the qualities that he properly desired his Deputy Constables to manifest. That respondent made her remark during office hours and while on probationary status gave the Constable additional reason to conclude that she would be a negative influence on the agency's reputation and efficiency. The Constable was, therefore, entitled to discharge her for making her statement, notwithstanding whatever First Amendment value that statement might have.

The ministerial nature of respondent's duties does not render the Constable's judgment unreasonable. Public confidence in the agency's dedication to its mission, as well as the agency's need to foster proper attitudes among its employees, requires that the prohibition against unprofessional behavior—and, specifically, the prohibition against open approval of serious violations of the criminal law—be imposed on employees at all levels, regardless of job function. The "appearance" of governmental integrity and commitment to official duty would be greatly endangered if a public employer, especially a law enforcement agency, could not hold its employees, regardless of level, to minimal standards of professionalism, which include, of course, a requirement that employees refrain from expressing approval of serious violations of the law that the agency is charged with enforcing. In any event, the Constable had authorized respondent to act in his "place and stead" and would be deemed to have ratified all of her comments and actions during work hours; in these circumstances, respondent should be held to the same standards to which the Constable himself is held. The court of appeals' contrary judgment is erroneous.

ARGUMENT

THE COURT OF APPEALS ERRED IN HOLDING THAT THE FIRST AND FOURTEENTH AMENDMENTS PRECLUDE A PUBLIC LAW ENFORCEMENT AGENCY FROM DISCHARGING AN EMPLOYEE FOR EXPRESSING HER UNFLINCHING APPROVAL OF AND DESIRE FOR THE ASSASSINATION OF THE PRESIDENT OF THE UNITED STATES

For many years, this Court held that public employers could require their employees to waive their constitutional rights, including their rights of free speech, as a condition of employment. See, *e.g.*, *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Garner* v. *Los Angeles Board*, 341 U.S. 716 (1951). The classic formulation of

this position was that of Justice Holmes, who observed that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). More recently, however, the Court has determined that, in some circumtances, it is unreasonable for public employers to require their employees to waive their free speech rights as a condition of employment. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183 (1952); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886 (1961); *Keyishian* v. *Board of Regents*, 358 U.S. 589 (1967). Under these decisions, the free speech components of the First and Fourteenth Amendments require the judiciary "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968).

In *Connick* v. *Myers*, 461 U.S. 138 (1983), the Court made clear that judicial superintendence of public employers' personnel decisions has specific limits. The Court there concluded that, if an employee's expression "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for [the courts] to scrutinize the reasons for [the] discharge" (*id.* at 146 (footnote omitted)). The Court in *Connick* emphasized "that government offices could not function if every employment decision became a constitutional matter" (*id.* at 143), and that ordinary dismissals from government service are not subject to judicial review merely because the employer's reasons "are alleged to be mistaken or unreasonable" (*id.* at 146-147). Accordingly, the Court held that, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials

should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" (*id.* at 146). And where expressive activity does touch on a "matter of public concern," the Court stated, the constitutional balance "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public" (*id.* at 150). The Constitution does not require a public employer to "tolerate action which [he] reasonably believe[s] would disrupt the office, undermine [his] authority, and destroy close working relationships" (*id.* at 154).

The decision below—that the First and Fourteenth Amendments preclude a public law enforcement agency from discharging an employee for expressing her unflinching approval of and desire for the assassination of the President—ignores the Court's admonitions in *Connick*. Respondent's expressive activity did not address a "matter of public concern" within the meaning of this Court's decisions. The employment-related sanction imposed by the Constable thus should not have been subjected to judicial review to begin with. And even if respondent's remark favoring the assassination of the President were deemed to address a "matter of public concern," the Constable nevertheless had a legitimate and substantial reason for discharging her. A public law enforcement agency has an overriding interest in employing only those persons who project a suitable image for law enforcement personnel, an image that is not conveyed by those who stubbornly profess genuine approval of violent criminal acts. The Constable's interest in maintaining the reputation and efficiency of his law enforcement agency clearly outweighs whatever First Amendment value attaches to respondent's tasteless and inane remark.

A. Expression That Approves Of And Genuinely Desires The Assassination Of The President Cannot Fairly Be Characterized As Speech On A Matter Of Public Concern

In *Connick* v. *Myers*, this Court observed that the district court had "got off on the wrong foot" by finding the subject of the employee's speech to be addressed to "matters of public importance and concern" (461 U.S. at 143). The court of appeals committed a similar misstep at the threshold here. It believed itself "required to engage in *Pickering/Connick* balancing" because of its assumption that, in the context of this case, "the life and death of the President are obviously matters of public concern" within the meaning of those decisions (Pet. App. 36a). That assumption is incorrect.

1. This Court has long recognized that not all expression is of equal value under the First Amendment. The Court has determined, for example, that some types of speech are not entitled to any First Amendment protection at all. See *New York* v. *Ferber*, 458 U.S. 747 (1982) (child pornography); *Roth* v *United States*, 354 U.S. 476 (1957) (obscenity); *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952) (libelous speech); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words). It has held that other types of speech deserve only a reduced level of First Amendment protection. See *Connick* v. *Myers*, 461 U.S. at 148-149 (discussion of office morale and other internal office affairs); *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 771-772 (1976) (commercial speech). Finally, it has held that still other types of speech are "at the heart of the First Amendment's protection" (*First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 776 (1978)), and occupy the "highest rung of the hierarchy of First Amendment values" (*NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). These latter types of expression, the Court has said, are those that relate to "matter[s] of legitimate public concern." See *Connick* v. *Myers*,

461 U.S. at 145; *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985), slip op. 7-11; *Philadelphia Newspapers, Inc.* v. *Hepps*, No. 84-1491 (Apr. 21, 1986), slip op. 10-11.

The Court in *Connick* reviewed its prior "public concern" cases and found them inspired by a common principle. In each instance, the "content, form, and context of a given statement, as revealed by the whole record," showed that the speech at issue contributed to the " 'free and open debate [that] is vital to informed decisionmaking by the electorate' " (461 U.S. at 147-148, 145, quoting *Pickering* v. *Board of Education*, 391 U.S. at 571-572)). " '[S]peech concerning public affairs,' " the Court stated, " 'is more than self-expression; it is the essence of self-government' " (461 U.S. at 145, quoting *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964)).

The *Connick* case involved an employee who was discharged for circulating to her fellow employees a questionnaire concerning internal office affairs with which she was unhappy. One question in that questionnaire asked whether her co-workers felt pressured to work in political campaigns. As to this question, the Court found that her expression related to "a matter of interest to the community," reasoning that "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights" (461 U.S. at 149). The other questions in the questionnaire, however, pertained to "the confidence and trust that [her] co-workers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee" (*id.* at 148). These questions, the Court determined, were of no "public import in evaluating the performance of the [employer] as an elected official" (*ibid.*), "did not seek to inform the public that the [employer] was not discharging its governmental responsibilities" (*ibid.*), and did not "seek

to bring to light actual or potential wrongdoing or breach of public trust on the part of [the employer] and others" (*ibid.*). The Court acknowledged that the questionnaire's "subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest" (*id.* at 148 n.8). On the record before it, however, the Court held that these questions related to internal office affairs and not to "matters of public concern."

Two Terms later, in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, No. 83-18 (June 26, 1985), the Court examined the First Amendment implications of expression wholly unrelated to internal office affairs and found that it too did not involve a "matter of public concern." The question there was whether certain reports of a credit reporting agency were entitled to the highest level of protection available under the First Amendment. Applying the "content, form, and context" analysis set forth in *Connick*, five Justices agreed that the credit reports did not relate to "matters of public concern" and, accordingly, did not lie at the core of the First Amendment. See *Dun & Bradstreet*, slip op. 12-13 (plurality opinion); slip op. 2 (opinion of Burger, C.J.); slip op. 10-11 (opinion of White, J.). As Justice Powell explained for the plurality, the credit reports were "speech solely in the individual interest of the speaker and its specific business audience" (slip op. 12). The reports' limited circulation demonstrated that they did not implicate society's " 'strong interest in the free flow of * * * information' " (*ibid.*, quoting *Virginia Pharmacy Bd.* v. *Virginia Consumer Council*, 425 U.S. 748, 764 (1976)), and ' "there [was] simply no credible argument that this type of credit report require[d] special protection to ensure that 'debate on public issues [will] be uninhibited, robust, and wide-open' " (slip op. 12-13, quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)).

2. We think that *Connick* and *Dun & Bradstreet* compel a quite different conclusion concerning the First Amendment implications of respondent's expression than was reached by the court of appeals. For when one examines the "content, form, and context" of respondent's remark, it is clear that her speech did not address any "matter of legitimate public concern," at least not within the meaning of this Court's decisions.

Respondent's remark favoring the President's assassination did not, as the court of appeals suggested (Pet. App. 36a), speak to a matter of public concern simply because it dealt with the "life and death of the President." To be sure, the subject of presidential assassination *in general* raises many questions of interest to historians, contemporary commentators, and the public, and many of these questions may provoke thought and debate that lie at the core of the First Amendment. The public is rightly interested in the facts surrounding an assassination attempt, the state of the President's health, the adequacy of presidential security, and the steps that the government is taking to deal with the crisis. These and other aspects of an attempted assassination are "matters of public concern" that relate to the "essence of self-government." But respondent's remark favoring the President's assassination was none of these. Rather, it expressed only a personal and individuated desire that the President's life be brought to a violent end. In our view, a venting of spleen like this cannot seriously be thought to "rest[ ] on the highest rung of the heirarchy of First Amendment values." *Carey* v. *Brown*, 447 U.S. 455, 467 (1980).

The intellectual discourse of our democratic body politic is in no way advanced by the expression of sentiments like those respondent uttered. Our society has never considered assassination of public officials to be a viable or tolerable means of "bringing about * * * political and social changes desired by the people"

(*Roth* v. *United States*, 354 U.S. 476, 484 (1957)), and has never treated expression favoring assassination as an instance of rational or legitimate debate. See *Frohwerk* v. *United States*, 249 U.S. 204, 206 (1919) ("We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counselling of a murder * * * would be an unconstitutional interference with free speech."). See also 18 U.S.C. 871(a) (making certain threats on the life of the President a criminal offense). Accordingly, respondent's statement cannot properly be said to be protected on the theory that it addresses "a matter of legitimate public concern." *Pickering* v. *Board of Education*, 391 U.S. at 571-572; *Connick* v. *Myers*, 461 U.S. at 145.

This common-sense conclusion is fortified by the "content, form, and context" analysis that this Court employed in *Dun & Bradstreet* and *Connick*. In terms of "content," respondent's remark is much like the credit reports at issue in the former case and the discussion of internal office affairs at issue in the latter. Discussion favoring the assassination of the President has no potential for assisting the public "in evaluating the performance of the [President] as an elected official" (*Connick*, 461 U.S. at 148). Nor will it add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties, or "bring to light any actual or potential wrongdoing or breach of trust" on the President's part (*ibid.*). "[I]f released to the public, [the remark] would convey no information at all" (*ibid.*), except, perhaps, that this individual would personally like to see the President violently removed from office. But speech of this type is "solely in the individual interest of the speaker and its specific * * * audience" (*Dun & Bradstreet*, slip op. 12 (plurality opinion)). The remark is in essence pure "self-expression," and not "speech concerning public affairs." *Garrison* v. *Louisiana*, 379 U.S. at 74-75. See *Yoggerst* v.

Hedges, 739 F.2d 293, 296-297 (7th Cir. 1984); see generally *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 785 (1978) (First Amendment principally concerned with "debatable public question[s]").

Nor, in our view, does the "form" of respondent's remark transform it into speech that addresses a "matter of public concern." In certain situations, this Court has held that the "emotive" aspect of a person's words may make them deserving of *some* First Amendment protection, at least to the point where the state may not criminalize the utterance. See *Cohen* v. *California*, 403 U.S. 15, 26 (1971) (expletive concerning the draft). On the other hand, this Court has also held, in other situations, that potential "emotive" effects are precisely the reason that certain expression should receive *no* First Amendent protection at all. See, *e.g.*, *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572 (1942) ("fighting words" are "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"); *Cantwell* v. *Connecticut*, 310 U.S. 296, 309-310 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."). Expression approving of the assassination of American political officials has emotive implications that threaten the order of our democratic polity. See *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). Thus, we believe that such statements are not more than one step removed from those forms of expression—such as fighting words and incitement to riot—that this Court has held should receive no First Amendment protection whatsoever. See *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 591-592 (1952) (distinguishing for First Amendment purposes between expression "advocating change * * * by lawful elective processes and advocating change by force and violence"). While statements like respondent's may

not properly be criminalized, they clearly are not entitled to the special protection accorded political speech at the core of the First Amendment.

Finally, in terms of "context," respondent did not make her remark during a public rally or debate and in this respect the remark was like the employee's questionnaire in *Connick* and the credit agency's reports in *Dun & Bradstreet*. Respondent made her remark in casual office conversation with a fellow employee and then, when questioned further, reiterated it in a closed-door discussion with her employer. Compare *Pickering* v. *Board of Education*, 391 U.S. at 566 (letter written to a newspaper by a teacher in response to previously-published articles about schools). Thus, respondent's discussion with the Constable was separate from and no part of her expression of "disapproval of the President's policies" (Pet. App. 36a n.1); it was simply a crude and offensive remark made during private conversation while serving in a law enforcement office. Cf. *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) (expression relates to "matter of public concern" when it focuses on school's allegedly racially discriminatory policies, even though made privately). In "context," therefore, it is clear that respondent was not speaking out upon a "matter of public concern," but rather was engaging in an "absurd and immature antic" (*Cohen* v. *California*, 403 U.S. at 27 (Blackmun, J., dissenting)). In such circumstances, "agonizing over First Amendment values seems misplaced and unnecessary" (*ibid.*).

3. In contending that respondent's speech does not touch upon "a matter of public concern," we do not suggest that her words are "totally beyond the protection of the First Amendment," or that they fall into "one of the narrow and well-defined classes of expression which carries so little social value * * * that the State can prohibit and punish such expression by all persons in its jurisdic-

tion" (*Connick* v. *Myers*, 461 U.S. at 147). As the court of appeals observed (Pet. App. 34a), "[a] state would * * * face considerable constitutional obstacles if it sought to criminalize the words that were uttered by [respondent] on the day the President was shot." Cf. *Watts* v. *United States*, 394 U.S. at 708 ("political hyperbole," amounting to an "offensive method of stating political opposition to the President," is not a criminal offense under 18 U.S.C. 871(a)). We do suggest, however, that respondent's expression of approval of and desire for the assassination of the President, judged by its "content, form, and context," occupies at best a "subordinate position in the scale of First Amendment values." *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). From this premise, it necessarily follows that the employment-related sanction that respondent received cannot be challenged as a violation of her free speech rights under the First and Fourteenth Amendments. *Connick* v. *Myers*, 461 U.S. at 146, 148-149; see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 505 n.22 (1984). Such a conclusion will not "suppress the rights of public employees to participate in public affairs" (*Connick* v. *Myers*, 461 U.S. at 144-145). Rather, it will prevent disaffected public employees from resisting disciplinary action for unprofessional behavior by invoking "the name of the First Amendment" (*id.* at 146).

B. Even If Respondent's Expression Could Be Regarded As Speech On A Matter Of Public Concern, Her Discharge Was Nevertheless Justified By Legitimate Countervailing Interests Of The Law Enforcement Agency For Which She Worked

The conclusion that a public employee's expression is directed to "a matter of public concern" does not, standing alone, immunize that person from job-related sanctions. *Connick* v. *Myers*, 461 U.S. at 149-154. As this Court has

recognized, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering* v. *Board of Education*, 391 U.S. at 568. Thus, a public employer may restrict its employees' expressive activities if the governmental interest it seeks to promote outweighs the employees' First and Fourteenth Amendment entitlement. See *Connick* v. *Myers*, 461 U.S. at 149-150; *Pickering* v. *Board of Education*, 391 U.S. at 568. We think that a law enforcement agency's interest in not employing a person who, during office hours, expresses and stubbornly adheres to a desire that the President be assassinated clearly outweighs that individual's interest in expressing herself in that manner. Therefore, even if favoring the assassination of the President could properly be characterized as a topic of legitimate public debate, we would conclude that petitioner did not violate respondent's free speech rights by discharging her for making such a comment.

1. This Court has long recognized that "the government's interest in the effective and efficient fulfillment of its responsibilities to the public" is a substantial one (*Connick* v. *Myers*, 461 U.S. at 150). "[T]he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs" (*Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)). "Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency" (*ibid.*). Thus, the government must have "the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch" (*ibid.*).

An employee may hinder the efficient operation of a public agency in several ways. Most obviously, an employee may engage in conduct or expression that impedes his own ability to perform the job responsibilities assigned to him. See *Pickering* v. *Board of Education*, 391 U.S. at 572-573. Likewise, an employee may engage in conduct or expression that impedes successful working relationships with fellow employees or supervisors. See *Connick* v. *Myers*, 461 U.S. at 151-153; *Janusaitis* v. *Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 19 (2d Cir. 1979) ("an esprit de corps is essential" among firefighters). Finally, an employee may engage in conduct or expression that "interfere[s] with the regular operation" of the agency in general (*Pickering* v. *Board of Education*, 391 U.S. at 573), by damaging the public's confidence that the agency is committed to and capable of performing its designated function. See *Arnett* v. *Kennedy*, 416 U.S. at 162; *Gasparinetti* v. *Kerr*, 568 F.2d 311, 315-316 (3d Cir. 1977), cert. denied, 436 U.S. 903 (1978).

That a public employer has a substantial interest in keeping its employees from damaging the agency's public "appearance" and "reputation" has been recognized often by this Court. For example, in *Snepp* v. *United States*, 444 U.S. 507, 509 n.3 (1980), the Court held that the Central Intelligence Agency has a "compelling interest" in maintaining "the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." Similarly, in sustaining the Hatch Act against First Amendment challenge, the Court held that Congress has a substantial interest, not only in ensuring that federal service employees "in fact avoid practicing political justice," but also in ensuring "that they appear to the public to be avoiding it." *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 565 (1973). And in sustaining the Lloyd-LaFollette Act (5 U.S.C. 7501) against First Amendment challenge, the Court upheld a federal regulation (5 C.F.R.

735.201a(f)) providing that a civil servant may be removed for engaging in expressive activity that "[a]ffect[s] adversely the confidence of the public in the integrity of the Government." *Arnett* v. *Kennedy*, 416 U.S. 134, 141-142 (1974). In each of these cases, the Court recognized that the government has an overriding interest in regulating "employee behavior, including speech, which damages and impairs the reputation and efficiency of the employing agency." *Id.* at 162 (opinion of Rehnquist, J.)[1]

A law enforcement agency naturally has a strong and legitimate interest in maintaining the reputation and appearance of being fully committed to enforcement of the

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[1] The decisions of this Court invalidating government loyalty oaths are not to the contrary. "The issue [in those cases] was whether government employees could be prevented or 'chilled' by the fear of discharge from joining political parties and other associations that certain public officials might find 'subversive.' " *Connick* v. *Myers*, 461 U.S. at 144-145. The loyalty-oath cases therefore held that the government may not seek to preserve its reputation for integrity through mechanisms that, because of their vagueness or overbreadth, operate to impair the right of citizens to participate in political affairs. See, *e.g.*, *Weiman* v. *Updegraff*, 344 U.S. 183, 191 (1952) (overbreadth); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967) (vagueness); *Cramp* v. *Board of Pub. Instruction*, 368 U.S. 278 (1961) (vagueness). On the other hand, where a restriction has been reasonably tailored in understandable language to accomplish its stated purpose, this Court has sustained prohibitions designed to preserve the government's appearance of integrity. See, *e.g.*, *Snepp* v. *United States*, 444 U.S. 507 (1980); *Arnett* v. *Kennedy*, 416 U.S. at 162 (opinion of Rehnquist, J.); accord, *id.* at 164 (opinion of Powell, J.); *id.* at 177 (opinion of White, J.); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 565. Indeed, the Court has sustained properly tailored loyalty oaths against First Amendment challenge. See, *e.g.*, *Cole* v. *Richardson*, 405 U.S. 676, 681-684 (1972). See generally *Developments in the Law, Public Employment*, 97 Harv. L. Rev. 1611, 1751 (1984) (noting that the Court has "recognize[d] the importance of the state and public interest in loyal public servants").

law. It depends on the public for tips about criminal activity, for testimony in support of its enforcement actions, and, most importantly, for voluntary compliance with the letter of the law. To maintain this spirit of cooperation, a law enforcement agency may properly insist that its employees "possess and publicly manifest qualities of character that accentuate the high standards of the field of law enforcement" (Pet. App. 11a). For if the law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends. See *Olmstead* v. *United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("For good or ill, [our Government] teaches the whole people by its example.").

For these reasons, the district court below correctly determined that respondent's remark—that she would approve of and, in fact, desire another attempt on the life of the President—was a source of legitimate concern to the Constable. The Constable runs a law enforcement agency.[2] He "does a great deal of work with the public" (Pet. App. 25a). People "would lose confidence in his officers and in him personally, and his credibility as a law enforcement officer would be destroyed," if he retained an

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[2] Although respondent apparently contends (Br. in Opp. 3) that the Constable's office is not really a "law enforcement office," the district court and the court of appeals rejected this argument. See Pet. App. 7a, 11a, 22a-26a, 33a, 40a. Their conclusions are firmly supported by evidence in the record. While the primary function of the Constable's office is to execute civil court service, juvenile court service, and mental health warrants (Br. in Opp. 3), the office is also responsible for arresting juveniles in criminal matters, serving process in criminal misdemeanor matters, and providing security for visiting dignitaries and high government officials. See J.A. 60-64, 67-70, 90-93. Furthermore, the Constable deems himself authorized by law to carry out any law enforcement function necessary to aid the citizenry that elected him. See J.A. 62, 70. Thus, while the law enforcement role of the Constable's office may be indirect in some respects, it is nonetheless significant.

employee who "espouse[d] the assassination of any president, judge, or other public official" (*id.* at 7a). Because respondent's comment was completely inconsistent with the public appearance and reputation that the Constable rightfully sought to project, he reasonably concluded "that an individual possessing an attitude such as [respondent's] is not a suitable employee of a law enforcement agency" (*ibid.*).

The time, place, and manner of respondent's expression plainly reinforced the reasonableness of the Constable's conclusion. See *Connick* v. *Myers,* 461 U.S. at 152-153 ("manner, time, and place" of expression relevant); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 415 n.4 (1979) (same). Respondent made her remark to co-workers at the office during office hours. See *Connick* v. *Myers,* 461 U.S. at 153. She held a probationary appointment and had been in the Constable's employ for fewer than 90 days, so that he had every reason to expect that she would be on her best behavior. Yet she elected to express her approval of and desire for the President's assassination at a time when her fellow employees were still stunned that an attempt had been made on the President's life. Moreover, when questioned about her statement by the Constable, respondent dug in her heels and insisted that she "meant" what she said, thus verging on insubordination and convincing the Constable that she did not have the temperament necessary for public service. In these circumstances, "[i]t was not unreasonable for Constable Rankin to lose confidence in the ability of one who would make such a statement as [respondent's], at the time and place it was made, to project a suitable image for law enforcement personnel or to make consistently appropriate law enforcement job decisions" (Pet. App. 11a).

Against these legitimate government interests justifying the Constable's decision to fire respondent must be balanced her First Amendment interest in speaking the words

she spoke. See *Connick* v. *Myers*, 461 U.S. at 142; *Pickering* v. *Board of Education*, 391 U.S. at 568. We have argued above that respondent's remark should not be regarded as "commenting upon matters of public concern" (*ibid.*) and hence that it occupies at best a "subordinate position in the scale of First Amendment values" (*Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. at 456). If, contrary to our primary submission, respondent's remark is judged to address "a matter of public concern," we obviously believe that it can creep into that highest echelon of the First Amendment heirarchy by only the slimmest of possible margins. The court of appeals itself characterized respondent's speech as "loathsome," "repulsive," and "nigh obscene" (Pet. App. 35a, 40a). Her wish that the President be assassinated, therefore, is a far cry from the expression at issue in *Pickering*, where a public school teacher wrote to a newspaper criticizing the board of education's proposals for financing school construction. Likewise, respondent's remark is a far cry from the expression at issue in *Givhan*, where a teacher spoke to her principal about alleged racial discrimination in the public schools. And respondent's remark is a far cry from the expression at issue in *Connick*, where an assistant district attorney asked her co-workers whether they "ever [felt] pressure[ ] to work in political campaigns" (461 U.S. at 149). Although the *Connick* Court held that in this respect the questionnaire did "touch[ ] upon a matter of public concern," it nevertheless concluded, after examining "the nature of the employee's expression," that her free-speech interests were outweighed by "the government's interest in the effective and efficient fulfillment of its responsibilities to the public" (*id.* at 149, 150). Since the Constable's interest in effective and efficient law enforcement is at least as strong as the public employer's interest in *Connick*, and

since the nature of respondent's expression makes it far less deserving of First Amendment immunity, the propriety of her discharge follows a fortiori from the holding in that case.

2. The court of appeals agreed with much of the analysis that we have outlined here. It noted that "a government agency is entitled to employ only those individuals who have no serious reservations about [its] fundamental mission" and that "a law enforcement agency cannot be expected to carry out its mission through officers who favor political assassination" (Pet. App. 40a). The court therefore "agree[d] that Constable Rankin's action in dismissing [respondent] was based on an important and legitimate government interest" (*id.* at 40a-41a). The court concluded, however, that, because respondent had only "ministerial" duties, her "potential for undermining the office's mission [was] trivial" and, accordingly, that her First Amendment interest outweighed the Constable's interest in promoting the integrity and efficiency of his operations (*id.* at 42a). We believe this line of analysis to be misdirected, both as it applies to the facts of this case and on a level of more general principle.

Although respondent was a "clerk-typist" whose job seldom brought her into contact with the public, the risk that a person with her expressed beliefs would undermine the agency's reputation and appearance was nevertheless substantial. Respondent's remark had already become the subject of discussion within the office, as the reaction of the senior Deputy Constable shows. Moreover, because remarks concerning the assassination of the President are very serious matters (see 18 U.S.C. 871(a)), the Constable quite responsibly decided to report the incident to the Secret Service. In doing so, he had to place himself in the potentially embarrassing situation of having another agency of government investigate one of his employees for possible violations of the criminal law. Under this Court's precedent, the Constable did not have "to allow events to

unfold to the extent that the disruption of the office and the destruction of working relationships [were] manifest before taking action" (*Connick* v. *Myers*, 461 U.S. at 152). Rather, he was entitled to act on his quite "reasonable beli[ef] that [respondent's continued employment] would disrupt the office, undermine his authority, and destroy close working relationships" (*id.* at 154). The fact that respondent's duties were "ministerial" in no way undermines the legitimacy of the Constable's concerns.

Quite apart from the facts of this case, however, the court of appeals' theory—that the government's interest in prescribing minimum standards of acceptable speech and conduct for its employees varies with "the employee's role in [the] agency" (Pet. App. 42a)—strikes us as fundamentally wrong. The appearance of governmental integrity and commitment to official duty would be lost if every employee holding a "lowly job" (*ibid.*) were at liberty to undercut the message that the agency is responsible for sending to the public. Cf. *Arnett* v. *Kennedy*, *supra* (prohibition against engaging in activity that adversely affects the "integrity" of the government applicable to all individuals in the competitive service); *Civil Service Commission* v. *Letter Carriers*, *supra* (Hatch Act prohibitions applicable to most employees in the federal service). Speech advocating discrimination against minorities would be improper, in our view, for any employee of the Equal Employment Opportunity Commission. Speech advocating non-compliance with tax laws or (worse yet) tax fraud would be inappropriate for any employee of the Internal Revenue Service. And speech advocating non-compliance with the draft laws would be inappropriate for any employee of the Selective Service System. This Court, of course, has held that a state may not make it a crime for a person to enter a public building wearing a jacket that bears a message obscenely critical of the draft. *Cohen* v. *California*, 403 U.S. at 16. But the Court has never suggested that a draft board would be precluded from dis-

charging a person, whatever his position in the agency, who insisted on expressing himself in this way.

Public confidence in an agency's dedication to its mission, as well as the agency's need to foster proper attitudes among its workers, requires that no employee be excused from a *minimum* commitment to the agency's official responsibilities. That minimum commitment, we think, includes refraining from espousing actions that violate the laws the agency is assigned to enforce. This is not to say that the government might not find, in appropriate circumstances, that additional restrictions should be imposed on employees at higher levels. Such officials are more visible and may sometimes be required to make greater sacrifices in order to promote the reputation of the agency that employs them. Financial disclosure laws are an obvious example of this precept. But the fact that more is demanded of some employees should not relieve any employee of the responsibility to abide by the agency's minimum standards of decorum and professionalism. In light of "the common-sense realization that government offices could not function if every employment decision became a constitutional matter" (*Connick* v. *Myers*, 461 U.S. at 143 (footnote omitted)), we believe that the proper task of the courts is not to determine *which* employees should be bound by a restraint on expressive activity, but rather to determine *whether* the restraint is itself justifiable. As we have explained, a prohibition against espousing violations of the law that the agency is charged with enforcing is clearly justifiable under the First Amendment.

In any event, even if an agency is not entitled to set minimum standards of behavior for all of its employees, petitioner should nevertheless be entitled to discharge respondent for behavior that the court of appeals agreed would warrant the discharge of a law enforcement officer

possessing greater "discretion or power" (Pet. App. 42a). Respondent's role in the Constable's office was, at bottom, the same as the role of every other Deputy Constable: to assist petitioner in discharging his duties as Constable of Harris County in any lawful manner. Petitioner had authorized respondent to act in his "place and stead, to do and perform any and all acts and things pertaining to the office of said Constable" (*id.* at 5a). Her "comments and actions during work hours [are ones that] he would be deemed to have ratified" (*id.* at 10a). Thus, she should be held to the same standards as the highest-level employee in the agency—the Constable himself.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

GLEN D. NAGER
Assistant to the Solicitor General

LEONARD SCHAITMAN
GREGORY C. SISK
Attorneys

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OCTOBER TERM, 1986

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Petitioners,

v.

ARDITH MCPHERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
CYNTHIA L. ESTLUND
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)
Attorneys for Amicus Curiae
National Education Association

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	5
BY DISCHARGING PLAINTIFF FOR THE OPINION SHE EXPRESSED, THE CONSTABLE DEPRIVED PLAINTIFF OF HER CONSTITUTIONAL RIGHT OF FREE EXPRESSION	5
A. Introduction	5
B. The *Connick* Issue	10
C. The *Pickering* Issue	20
CONCLUSION	29

TABLE OF AUTHORITIES

Cases: Page

Baird v. State Bar of Arizona, 401 U.S. 1 (1971) 21
Board of Education v. Barnette, 319 U.S. 624 (1943) 8, 26
Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984) 9, 11, 13
Brandenburg v. Ohio, 395 U.S. 444 (1969) 2, 8, 9
Branti v. Finkel, 445 U.S. 507 (1980) 4, 21, 26, 29
Carey v. Brown, 447 U.S. 455 (1980) 17
Cary v. Population Services International, 431 U.S. 678 (1977) 8
Cohen v. California, 403 U.S. 15 (1971) 7
Cole v. Richardson, 405 U.S. 676 (1972) 28
Communist Party of Indiana v. Whitcomb, 414 U.S. 441 (1974) 9, 28
Connick v. Myers, 461 U.S. 138 (1983) ..... *passim*
Cramp v. Board of Public Instruction, 368 U.S. 278 (1961) 9
Dun & Bradstreet v. Greenmoss, —— U.S. ——, 53 L.W. 4866 (1985) 14, 15
Elfbrandt v. Russell, 384 U.S. 11 (1966) 9
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 15, 19
Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410 (1979) 3, 19
Gooding v. Wilson, 405 U.S. 518 (1972) 7
Healy v. James, 408 U.S. 169 (1972) 3, 8
Hess v. Inidana, 414 U.S. 105 (1973) 8
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 9
Konigsberg v. State Bar, 366 U.S. 36 (1961) 10
Law School Research Council v. Wadmond, 401 U.S. 154 (1971) 28
Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) 15
NAACP v. Button, 371 U.S. 415 (1963) 8
NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 8
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 8

TABLE OF AUTHORITIES—Continued

	Page
Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)	17
Perry v. Sindermann, 408 U.S. 597 (1972)	2, 10
Pickering v. Board of Education, 391 U.S. 563 (1968)	*passim*
Spence v. Washington, 418 U.S. 405 (1974)	26
Speiser v. Randall, 357 U.S. 513 (1958)	28
Street v. New York, 394 U.S. 576 (1969)	8
Terminiello v. Chicago, 337 U.S. 1 (1949)	26
Thornhill v. Alabama, 310 U.S. 88 (1940)	18
United States v. Robel, 389 U.S. 258 (1967)	9, 29
United States v. Schwimmer, 279 U.S. 644 (1929)	8
Watts v. United States, 394 U.S. 705 (1969)	7, 8
Whitney v. California, 274 U.S. 357 (1927)	21, 27
Wood v. Georgia, 370 U.S. 375 (1962)	25
Wooley v. Maynard, 430 U.S. 705 (1977)	5, 8, 21, 26

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The National Education Association files this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

The National Education Association (NEA) is the largest public employee organization in the United States, with approximately 1.8 million members, virtually all of whom are employed by public educational institutions. One of NEA's principal purposes is to safeguard the constitutional rights of its members in matters pertaining to their employment.

SUMMARY OF ARGUMENT

Plaintiff was discharged from her clerical position in the Constable's office because the Constable determined that she "meant it" when she stated, in a private conversation with her boyfriend, that she opposed the policies of President Reagan to such an extent that "if they [attempt to assassinate] him again, [she hoped] they

[would] get him." No one would dispute that the view plaintiff expressed in that regard was "repulsive, nigh obscene," JA 129, but it likewise is beyond dispute that the expression of such views is constitutionally protected in the sense that plaintiff could not be subject to criminal or civil penalties for the view she expressed. *E.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Nor, as a general proposition, may a person be discharged from public employment for holding or expressing such constitutionally protected views (*Perry v. Sindermann*, 408 U.S. 593 (1972)), unless it is established in a particular case that the employee's First Amendment interests are outweighed by "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

The court of appeals determined in this case that the *Pickering* test was applicable, and that plaintiff's First Amendment interests outweighed the interests put forward by the Constable in his attempt to justify plaintiff's discharge. In their challenge to the court's conclusion, the Constable and the Solicitor General both contend that the *Pickering* balance should have been drawn in favor of the Constable. And, seeking to inject a threshold issue into the case, the Solicitor General further contends that this case falls into the limited category discussed in *Connick v. Myers*, 461 U.S. 138 (1983), in which the First Amendment permits the discharge of a public employee on the basis of his speech without regard to the reasons for the discharge, and without resort to the *Pickering* test. Both of those contentions are wrong.

1. The Solicitor General misconceives the holding of *Connick*. In that case the Court, recognizing that "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," 461 U.S. at 149, held that when an employee speaks about "an employee grievance" (*id.* at 147, 148, 154) which is only of "personal interest" (*id.*

at 147) and "cannot be fairly considered as relating to any matter of political, social or other concern to the community" (*id.* at 146), the employee may be discharged without any requirement that the discharge be justified by reference to any particularized governmental interests.

This case, however, does not involve speech over "internal office affairs" or an "employee grievance," and for that reason alone the *Connick* limitation is inapplicable here. Furthermore, this case *does* involve the expression of views relating to "a matter of political, social or other concern to the community." Even if plaintiff's speech were artificially divorced from its context (a discussion criticizing Reagan administration social and economic policies), it would remain *political* expression, involving "a matter inherently of public concern." (*Connick*, 461 U.S. at 148 n. 8.) The Solicitor General's principal argument to the contrary—i.e., that plaintiff's speech did not involve a matter of "legitimate" public concern—is nothing more than a dressed-up claim that plaintiff's views are so intolerable that they ought not be heard. *Connick* lends no support to that contention, which runs contrary to the very essence of the First Amendment. *E.g.*, *Healy v. James*, 408 U.S. 169, 188 (1972).

Nor does *Connick* support the Solicitor General's suggestion that plaintiff's speech did not relate to a matter of public concern because it did not involve the communication of information to the general public. Although such a consideration would be relevant where, as in *Connick*, it is ambiguous whether the subject of an employee's remark is a matter of public or purely private concern, in the case at hand, where the views expressed by the plaintiff relate to a matter of *inherent* public concern, it is of no moment that plaintiff did not seek to communicate information to the general public. *Cf. Givhan v. Western Line Consol. Sch. Distr.*, 439 U.S. 410 (1979). Under the contrary view espoused by the Solicitor General, public employers would have *carte*

blanche to fire employees for stating an opinion on any subject; for unless the opinion were expressed in such a way as to convey information to the general public, it would not rise to the level of "public concern" as defined by the Solicitor General. *Connick* does not establish such a sweeping rule.

2. Because plaintiff's speech did not relate to a personal employment dispute, but related instead to a matter of public concern, it is necessary "to scrutinize the reasons for [plaintiff's] discharge." *Connick*, 461 U.S. at 146.

The Constable's reason for discharging plaintiff—that he "lost all confidence in her"—reduces to the claim that one who holds plaintiff's view cannot be trusted to perform the duties of her position. The First Amendment, however, prohibits the dismissal of a public employee because of governmental disapproval of her beliefs, unless those beliefs would in fact "interfere with the discharge of [her] public duties." *Branti v. Finkel*, 445 U.S. 507, 517 (1980). The court of appeals correctly determined that such is not the case here: "[h]owever ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office," JA 136.

Nor is there any merit to the Solicitor General's alternative contention that plaintiff's discharge was justified because her remark threatened to destroy public confidence in the Constable's office. The Constable did not purport to fire plaintiff for that reason. And in any event, the record belies the Solicitor General's contention that the interest of the Constable's office in maintaining public confidence was implicated in any way by plaintiff's views. There was no reasonable likelihood that plaintiff's remark would come to the attention of the public or, if it did, that the public would lose confidence in the Constable as a result of this remark by a clerical employee which did not even relate to the business of the agency.

There is consequently no occasion to consider in this case how the interest of a government agency in maintaining public confidence would be weighed in the *Pickering* balance if that interest were truly implicated by an employee's expression of a particular belief. In such a case, difficult questions would arise as to whether the government's reliance on asserted public opinion could be reconciled with the First Amendment's protection of "the right of individuals to hold a point of view different from the majority." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977). And even if that problem could be put aside, vexing questions would remain as to the circumstances, if any, in which the discharge of a public employee for expressing views on a matter of public concern could be deemed to be justified by the government's fear that the public might *erroneously* conclude that the employee's beliefs were inconsistent with the proper functioning of the agency. To reach "the most appropriate possible balance of the competing interests" in such a situation (*Connick*, 461 U.S. at 150) would present a complex task, which need not be assayed in this case because the government's interest in maintaining public confidence was not implicated at all by plaintiff's speech.

For these reasons, the court of appeals was correct in concluding that the First Amendment interests of the plaintiff in holding and expressing views on a matter of public concern outweighed the interests asserted by the Constable for discharging her on that ground.

ARGUMENT

BY DISCHARGING PLAINTIFF FOR THE OPINION SHE EXPRESSED, THE CONSTABLE DEPRIVED PLAINTIFF OF HER CONSTITUTIONAL RIGHT OF FREE EXPRESSION

A. Introduction

On March 30, 1981, upon hearing a report that an assassination attempt had been made on President Reagan, plaintiff-respondent Ardith McPherson ("plaintiff")

engaged in a brief and what she thought was a private conversation with her boyfriend, Lawrence Jackson.[1] In that conversation, plaintiff expressed her opinion that the assassin (whose identity at that time was unknown) was probably animated by hostility toward President Reagan's social policies, and in particular his proposal to cut back funds for job training, welfare, food stamps, medicaid and other such programs.[2] Plaintiff viewed those cutbacks as "wrong" and they "anger[ed]" her, because plaintiff, a black woman, felt that the programs targeted for cuts were ones that "black people depend on a lot".[3] "Plaintiff concluded [this] discussion . . . about th[e assassination attempt] and about Reagan administration economic policies with the statement, 'I hope if they go for him (President Reagan) again, they get him." JA 38 (District Court Memorandum Opinion of April 15, 1983, Finding ¶ 12). For expressing this opinion—and for repeating it to the Constable, at his request[4]—plaintiff was discharged. That discharge is the subject of the instant proceeding.

It is important to be clear, at the threshold, what is—and equally important, what is not—at issue here. To

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[1] Hearing of January 21, 1985, Tr. at 67, 74, 144.

[2] *Id.* at 73-74, 144-45.

[3] Hearing of February 14, 1983, Tr. at 14-15.

[4] The Constable explained at trial that, upon hearing a report of plaintiff's remark (which had been overheard by another employee), the Constable called plaintiff into his office and asked her whether she, in fact, hoped that if another assassination attempt were made it would be successful; plaintiff answered in the affirmative. The Constable testified that "[r]ight then is when I lost confidence with her, and I told her that I didn't have a position in that office for her any more" JA 86. The Constable added that "I based my action on a statement that was made to me direct," *id.*, and that he "was not concerned who she [plaintiff] had [originally] made the remark to," *id.* at 83, or with "whether the work was interrupted or not" by plaintiff's remark, *id.* at 86, because "I was interested in the remark was made to me direct. After she satisfied my mind, face to face, tht she meant what she said, then I did not go any further with it." JA 84.

begin with, this case does not raise any question as to whether a public employee may be discharged for threatening to do harm to the President (or to anyone else for that matter); the district court expressly found that plaintiff was *not* "threatening to do harm to the President." JA 119. Similarly, no question is presented here as to whether a public employee who advocates assassination (or other such crime) may be discharged, because plaintiff's statement to her boyfriend did not urge him (or anyone else) to engage in any such conduct. What plaintiff said, in context, is that she was so opposed to the President and his policies that she believed the President's death—and even a violent death—were preferable to a continuation of the Reagan administration. This is what we understand the district court to have meant when that court found that, although plaintiff's statement was *non*-threatening, her words "expressed *such dislike of a high public government official* as to be violent words in context," JA 119 (emphasis added).[5]

There is no doubt that plaintiff's statement, notwithstanding the "repulsive, nigh obscene," views she expressed, JA 129, is constitutionally protected in the sense that plaintiff could not be subject to criminal or civil penalties for the view she expressed. The First Amend-

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[5] It is worth noting that statements of the type made by plaintiff have not been uncommon in our history. *See Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas, J., concurring). The Solicitor General's attempt to analogize plaintiff's statement to "fighting words and incitement to riot," Br. of the United States at 17, is wide of the mark. As the Solicitor General states, such speech has been held unprotected because of its "potential 'emotive' *effects*," *ibid.* (emphasis added). Although plaintiff's speech, like the speech in *Cohen v. California*, 403 U.S. 15, 26 (1971), has an " 'emotive' aspect," Br. of the United States at 17, plaintiff's speech had no potential to cause emotional *actions*. Because it is solely that potential which justifies the denial of protection to "fighting words" and the like, *see Cohen, supra*, 403 U.S. at 20; *Gooding v. Wilson*, 405 U.S. 518 (1972), to state that plaintiff's speech was "not more than one step removed from those forms of expression," Br. for the United States at 17, is like saying that night is not more than one step removed from day.

ment protects "individual freedom of mind," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)—"not free thought for those who agree with us but freedom for the thought that we hate," *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting).[6] And that Amendment likewise protects the right to express "hateful" thoughts (or to express thoughts in hateful ways), and even to advocate hateful actions, "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).[7] As the Court has explained, the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

> "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly; but we have staked upon it our all." [*Id.* at 269-270; citations omitted.]

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[6] *See also, e.g., Board of Education v. Barnette*, 319 U.S. 624 (1943); *Street v. New York*, 394 U.S. 576, 593-94 (1969); *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Healy v. James*, 408 U.S. 169, 187-88 (1972). *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969).

[7] *See also, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1952) ("mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment"); *Cary v. Population Services International*, 431 U.S. 678, 701 and n. 28 (1977); *Hess v. Indiana*, 414 U.S. 105 (1973).

The same protection to speak one's mind has been afforded to public employees—even where the speech at issue relates to the use of force or violation of law. As the Court stated in *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 448-49 (1974):

> The principle that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" [*Brandenberg v. Ohio*, *supra*, 395 U.S. at 447] has been applied not only to statutes that directly forbid or proscribe advocacy . . . , but also to regulatory schemes that determine eligibility for public employment, *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *see also United States v. Robel*, 389 U.S. 258 (1967).

Notwithstanding the foregoing, the Constable, supported by the Solicitor General, argues that in this case the State was permitted to impose "employment-related sanctions . . . on the basis of [plaintiff's] statement[]," *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 n.22 (1984). Two alternative arguments are advanced in defense of the State's power. First, the Solicitor General argues that plaintiff's free speech interest was so insubstantial as to permit the discharge without regard to the nature of any particular countervailing interest of the government; the Solicitor General claims to find authority for this argument in *Connick v. Myers*, 461 U.S. 138 (1983). Second, the Constable and the Solicitor General both contend that plaintiff's speech threatened "the interests of the state, as an employer, in promoting the efficiency of the public services it performs through its employees" to such an extent as to justify her discharge under the balancing test stated in *Pickering v. Board of Education*, 391 U.S. 563,

568 (1968), quoted *infra*. We treat with these two arguments *seriatim*.

B. The *Connick* Issue

(1) For the past four decades, this Court

> has made clear that even though a person has no "right" to a valuable governmental benefit and even though government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible. [*Perry v. Sindermann*, 408 U.S. 593, 597 (1972).]

Given these principles, the mode of analysis the Court has applied in cases in which the state has denied a benefit on the basis of expressive activity has been precisely the same as the mode of analysis applied when the state attempts to criminalize such activity. Recognizing that First Amendment freedoms are not absolute in nature and that "a reconciliation must be effected" between constitutional interests and governmental powers, the Court first "requires an appropriate weighing of the respective interests involved." *Konigsberg v. State Bar*, 366 U.S. 36, 51 (1961). If, as a result of that balancing process it is determined that "the constitutional protection exists it must prevail," *id.* at 49, and the governmental action therefore is struck down.

In *Pickering*, the Court applied these general principles in the context of governmental action "regulating the speech of its employees." 391 U.S. at 568. Recognizing that the government's "interests as an employer

. . . differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general," the Court held:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. [*Id.*]

The Court added: "we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all [public employee] statements may be judged." *Id.* at 569. *Pickering* thus requires the courts to engage in "particularized balancing" on a case-by-case basis in order to "reach the most appropriate possible balance of the competing interests." *Connick v. Myers, supra*, 461 U.S. at 150.

In *Connick* the Court held that there is a particular category of cases—described in various terms in the course of the opinion—in which this "particularized," case-by-case balancing is *not* required; rather, public employee speech falling into this category "may be considered unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements," *Bose Corp. v. Consumers Union, supra*, 466 U.S. at 504-05 n. 22, without regard "to the reasons for [the] discharge," *Connick*, 461 U.S. at 146. The Solicitor General contends that the instant case falls into this special category and that therefore plaintiff was properly sanctioned for the view she expressed even if no demonstrated governmental interest was implicated by her speech. As we proceed to show, the Solicitor General is mistaken.

(2) In *Connick*, an assistant district attorney, Sheila Myers, was fired because, upon being involuntarily transferred from one section of her office to another, she had prepared and distributed a questionnaire "soliciting the views of her fellow staff members concerning office trans-

fer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. The lower courts found that the discharge violated Myers' First Amendment right as framed in *Pickering* "to comment on matters of public interest in connection with the operation of the public [agency] in which [she] work[s]." 391 U.S. at 568. On review in this Court, district attorney Connick "contend[ed] at the outset that no balancing of interests is required in this case because Myers' questionnaire concerned only internal office matters and that such speech is not upon a matter of 'public concern,' as the term was used in *Pickering*." 461 U.S. at 143. The Court found "much force to Connick's submission." *Id.* Proceeding from the premise that "government offices could not function if every employment decision became a constitutional matter," the Court reasoned that "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community"—when the speech does "not touch[] upon a matter of public concern"—"government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment," *id.* at 146-47. The Court therefore announced the following holding:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, *but instead as an employee upon matters only of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity *for employee grievances* not afforded by the First Amendment to those who do not work for the State. [*Id.* at 147; emphasis added.]

Applying this holding to the facts in *Connick*, the Court concluded, based on "the content, form and context" of Myer's questionnaire, *id.* at 147-48, that in the main the questionnaire was speech "as an employee upon matters only of personal interest" and was not "relat[ed] to any matter of political, social or other concern to the community." The Court reasoned that although "discussions of office morale and discipline could be matters of public concern," *id.* at 148-49 n. 8, Myers' questionnaire "is most accurately characterized as an employee grievance concerning internal office policy." *Id.* at 154. The questionnaire was an "extension[] of Myers' dispute over her transfer" and was an attempt to "gather ammunition for another round of controversy with her supervisors," and "to turn [her] displeasure [over her transfer] into a cause celebre." *Id.* at 148. In this context, the Court stated that:

> [I]t would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs *were confused with the attempt to constitutionalize the employee grievance that we see presented here.* [*Id.* at 154; emphasis added.]

(3) Fairly read, we submit, *Connick* creates a narrow exception to the general First Amendment rule that prohibits the States from penalizing a citizen for her beliefs, or speech, absent a particularized showing that the state interests in so doing outweigh the individual's First Amendment interest. That exception, as established in *Connick*, is limited to cases involving speech "tied to a personal employment dispute," *Connick*, 461 U.S. at 148 n.8, which in that sense is "only of personal interest," *id.* at 147. Time and again the Court stressed that what was involved in *Connick* was an "employee grievance," *id.* at 147, 148, 154.[8] As the Court put it, "the First Amend-

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[8] *See also Bose Corp. v. Consumers Union, supra*, 466 U.S. at 504 n. 22 (*Connick* exception applies to "[s]tatements made by public

ment does not require a public office to be run as a roundtable for employee complaints over internal office affairs," *id.* at 149. The Court's concern in *Connick* was that if Myers' discharge were subject to that type of balancing, this would mean that whenever a public employer took a personnel action with respect to an employee (*e.g.*, Myers' involuntary transfer), the employee's refusal to accept that decision would become a matter of constitutional moment, and the employer's interest in requiring adherence to its resolution of routine employee grievances would become subject to "intrusive oversight by the judiciary," *id.* at 147.

This case does not involve speech over "internal office affairs" or an "employee grievance." *Connick*'s discussion of the limitations that apply to First Amendment claims asserted in such a context therefore has no application here. Accordingly, in this case the controlling precedent is *Pickering* which, as the Court in *Connick* acknowledged, requires a "particularized balancing" of interests. 461 U.S. at 150.

(4) Even if, contrary to what we have just shown, the *Connick* rule were read to apply outside the category of employee grievances,[9] that rule still would not be appli-

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employees *in their employment capacity* and not touching on matters of public concern" (emphasis added)).

[9] The Solicitor General attempts to extract from *Dun & Bradstreet v. Greenmoss*, —— U.S. ——, 53 L.W. 4866 (June 26, 1985), the proposition that unless an employee's speech is deemed to be of public moment, the employee may be subjected to discharge or other employment sanctions by the government for uttering an opinion with which the employing agency disagrees, even if the employee's speech does not relate, as in *Connick*, to a "personal employment dispute," 461 U.S. at 148 n. 8, and even in the absence of a showing of a countervailing governmental interest. *See* Br. for the United States at 14. The Solicitor General's reliance on *Dun & Bradstreet* is misplaced. That case involved speech which was false and defamatory, and the Court has long held that "the erroneous statement of fact is not worthy of constitutional pro-

cable here. For as we proceed to show, plaintiff's speech unquestionably related to a "matter of political, social or other concern to the community," *Connick*, 461 U.S. at 147.

(a) By its very nature, a statement expressing the speaker's view of the desirability of a government official dying, or being assassinated, is *political* expression: such a statement necessarily communicates the speaker's view of the official and his policies or actions. And that is especially true in this case because, as the district court found, plaintiff's statement was made in the course of a discussion about "the assassination attempt on President Reagan . . . and the Reagan administration policies." By any definition, these are subjects of *public* rather than private concern. And thus the view plaintiff expressed in that conversation—that Reagan Administration policies were so abhorrent to her that if another

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tection." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). The issue in *Dun & Bradstreet*, therefore, was whether to "extend a measure of *strategic* protection to defamatory falsehood" in order to "assure to freedom of speech and press that 'breathing space' essential to their fruitful exercise," *Gertz*, 418 U.S. at 342 (emphasis added); because the speech in *Dun & Bradstreet* did not touch upon any matter of public concern, the Court decided not to afford "strategic protection" to that speech. That holding has no relevance to situations in which a public employee has engaged in speech which, although not addressed to a public issue, nonetheless *is* constitutionally protected, and the question is whether to permit the state to impose employment-related sanctions on the employee for the speech.

Thus, *Connick* and *Dun & Bradstreet* cannot fairly be read as resolving the scope of a public employer's power to impose employment-related sanctions on an employee for speech, even of a private nature, which does not relate to "a personal employment dispute," *Connick, supra*. The case which comes closest to dealing with such a situation is *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), in which a teacher was discharged for speech pertaining to a teacher dress code in the high school. It is far from clear to us that such speech is of "public concern" in the sense that the Solicitor General uses that term, yet the Court in *Mount Healthy*, applying *Pickering*, found the discharge unconstitutional.

assassination attempt was made, she desired to see it succeed—likewise cannot be considered unrelated to a "matter of political, social or other concern to the community," no matter how loathsome that view may be.[10]

(b) The Solicitor General states his contrary contention as follows:

> The intellectual discourse of our democratic body politic is in no way advanced, and may even be retarded, by the expression of sentiments like those respondent uttered. Our society has never considered assassination of public officials to be a viable or tolerable means of "bringing about * * * political and social changes desired by the people" and has never treated expression favoring assassination as an instance of rational or legitimate debate. Accordingly, respondent's statement cannot properly be said to be protected because it addresses "a matter of legitimate public concern." [Br. of the United States at 15-16; citations omitted.]

In other words, the Solicitor General reaches the conclusion that plaintiff's words are not addressed to a "matter of legitimate public concern" by focusing on the viewpoint plaintiff expressed; presumably, the Solicitor Gen-

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[10] The Solicitor General attempts to sever plaintiff's statement from its context, arguing that plaintiff's "discussion with the Constable was separate from and no part of her expression of 'disapproval of the President's policies'." Br. for the United States at 18. This argument is frivolous. First, as noted in text, even without any context plaintiff's statement would be an expression of her political beliefs. Second, in any event, plaintiff's statement was made in a particular context, and although it is true that plaintiff did not restate her "disapproval of the President's policies" when meeting with the Constable, that is because she was given no opportunity to do so; she was merely asked whether she had made the statement attributed to her and whether she meant it, and was discharged on the basis of her affirmative answers to those two questions, without being afforded any opportunity to further explain the basis for her statement. If plaintiff's original statement, in context, was related to a matter of public concern, it cannot have lost that status simply because plaintiff was asked by the Constable to repeat the statement out of context.

eral would reach the opposite conclusion had plaintiff expressed a different position with respect to the subject she discussed (*e.g.*, if plaintiff had said "although I deplore the President's policies, I hope he is never shot at again"). This is nothing more than a dressed-up claim that plaintiff's views are so intolerable that they ought not be heard. And the Solicitor General's invitation to the courts to decide in each case whether "intellectual discourse is . . . advanced by [a particular] expression of sentiments" would arrogate to the judiciary a censorial power that runs contrary to the very essence of the First Amendment, *see* pp. 7-9 *supra* and cases cited thereat.[11]

The Solicitor General attempts to give his argument an illusion of substance by borrowing some of the observations the Court made in *Connick* with respect to the questionnaire involved in that case and attempting to

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[11] Because, as explained in text, the view plaintiff expressed and for which she was fired was tied to a matter of public concern—specifically to the administration's policies—it seems to us that plaintiff's statement of her view, however loathesome, cannot fairly be placed on a " 'subordinate position in the scale of First Amendment values,' " as the Solicitor General contends, Br. for the United States at 19, *quoting Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978). Nonetheless, we hasten to point out that *Connick* does *not* hold that public employees are protected from discharge only with respect to speech that " 'rest[s] on the highest rung of the hierarchy of First Amendment values,' " Br. for the United States at 15, quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980). To the contrary, the Court in *Connick, see, e.g.*, 461 U.S. at 149-50, treated one aspect of the questionnaire in that case as related to an issue of public concern—and thus as falling within *Pickering*—even though the Court did not view that aspect of the questionnaire as speech of the "highest rung". Rather, the Court held that "the nature of the employee's expression" (461 U.S. at 150) and, more specifically, "the value of Myers' speech" (*id.* at 152), were matters to be assessed and weighed in the *Pickering* balance after it was first determined that the speech related to a matter of public concern rather than a private grievance. If that threshold determination had itself entailed a finding that the speech "rest[ed] on the highest rung" of First Amendment values, it is difficult to see why any further weighing of the "value" of Myers' particular speech would have been called for.

apply those observations to the instant case. Thus, the Solicitor General asserts that plaintiff's statement

> has no potential for assisting the public "in evaluating the performance of the [President] as an elected official" (*Connick*, 461 U.S. at 148). Nor will it add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties, or "bring to light any actual or potential wrongdoing or breach of trust" on the President's part (*ibid*). "[I]f released to the public, [the remark] would convey no information at all" (*ibid.*), except, perhaps, that this individual would personally like to see the President removed from office. [Br. for the United States at 16.]

This argument wrenches *Connick's* words from their context.

In *Connick*, determining whether the speech in question related to a matter of public concern was complicated by the fact that the subject matter of the discussion was neither inherently public nor inherently private in nature; as the Court stated, "discipline and morale in the workplace are related to an agency's efficient performance of its duties" and thus "discussion of office morale and discipline could be matters of public concern," 461 U.S. at 148 & n.8,[12] but such discussions equally can be nothing more than a statement of a private grievance. To determine into which category the particular speech at issue in *Connick* fell, the Court looked to the factors the Solicitor General notes, such as the fact that the speech in question "convey[ed] no information at all" and did not "seek to bring to light actual or potential

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[12] *Cf. Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period"; consequently "the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution" as "labor relations are not matters of mere . . . private concern").

wrongdoing or breach of trust." But the fact that those considerations were relevant in *Connick* to resolve the ambiguity as to whether the subject matter of the speech in question in that case was a public issue or a private dispute does not mean that such factors can be used to deny First Amendment protection to statements that are addressed to "a matter inherently of public concern" (*Connick*, 461 U.S. at 148 n.8), merely because the statements are not informative in nature. Yet that is what the Solicitor General is necessarily contending.

Indeed, on the Solicitor General's theory, any expression of pure opinion—for example, a statement that "I disagree with Reagan administration policies"—would be, in the Solicitor General's words, "pure 'self-expression,' and not '[s]peech concerning public affairs' ", Br. at 16, because such statements of opinion, by definition, do not "assist[] the public 'in evaluating the performance of the [President]' ", or "add to the public's cognitive understanding of how the President is performing his constitutionally mandated duties;" indeed, they "convey no information at all." The *only* speech that would seem to fit within the Solicitor General's definition of that which is of public concern would be reasoned statements of fact and argument that lead the speaker to a particular opinion. The First Amendment's commitment to "uninhibited, robust and wide-open debate"—including "vehement, caustic and unpleasantly sharp attacks" p. 8, *supra*—is not so limited; indeed, "however pernicious an opinion may seem," the First Amendment provides special sanctuary for the opinion's expression as "we depend for its correction . . . on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, *supra*, 418 U.S. at 339-40.[13]

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[13] *Connick* likewise rejects the Solicitor General's attempt to classify plaintiff's statement as private speech because it was made "in casual office conversation" and not "during a public rally or debate." Br. for the United States at 18. The Court in *Connick* expressly reaffirmed the lesson of *Givhan v. Western Line Consol. Sch. Distr.*, 439 U.S. 410 (1979), that if the subject matter of a

In sum, this is not a case like *Connick* in which "it is unnecessary for us to scrutinize the reasons for [plaintiff's] discharge." *Connick*, 461 U.S. at 146.

C. The *Pickering* Issue

The remaining question is whether, applying the balancing process outlined in *Pickering*, the Constable's action in discharging plaintiff can be sustained on the ground that it is justified by an overriding governmental interest. As we proceed to show, on the facts of this case, that question must be answered in the negative.

(1) The Constable seeks to justify the discharge on the ground that he must "have confidence" that those he employs "are in fact dependably doing their job" and that based on the view expressed by plaintiff, the Constable "lost all confidence in her." Pet. Br. at 13. In making this argument the Constable does not claim that anything about the time, place or manner of plaintiff's statement caused the Constable to question her judgment or her reliability; rather, the Constable relies solely on the *substance* of the view plaintiff holds, in the effort to justify the discharge.[14] The Constable argues, in essence, that one who holds such an admittedly extreme view cannot be trusted to perform the duties of the position for which plaintiff was hired. As we proceed to show, the Constable's argument does not withstand analysis.[15]

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statement touches upon a matter of public concern, constitutional protection "is not forfeited by [the] choice of a private forum." *Connick*, 461 U.S. at 148-49 n.8.

[14] In determining whether to discharge plaintiff, the Constable's concern was with whether she, in fact, held the view that had been attributed to her (*i.e.*, whether she "meant it"). That she had chosen to *express* that view in an office conversation was of no moment insofar as the Constable was concerned; he fired her because she "[said] to [him] direct" that her views were as had been reported. *See* n.4, *supra*.

[15] Insofar as the Constable is suggesting that the relevant question here is a purely subjective one—whether this Constable has lost confidence in this plaintiff—the argument sweeps way too far. Such an argument would allow any public employer to discharge

There can be no doubt, as previously shown, that "the right of freedom of thought [is] protected by the First Amendment," *Wooley v. Maynard*, *supra*, 430 U.S. at 714. It follows that as a general rule, "the First and Fourteenth Amendments bar a State from acting against any person merely because of his beliefs." *Baird v. State Bar of Arizona*, 401 U.S. 1, 10 (1971) (Stewart, J., concurring). And this general rule applies in the context of public employment: "the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs." *Branti v. Finkel*, 445 U.S. 507, 516-17 (1980).

The Court in *Branti* noted the limits of this rule: "if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." *Id.* Thus, for example, a white supremacist might constitutionally be denied a job as an equal employment counselor, and one who believes that incarceration is morally wrong might be denied a job as a prison guard.

But the sorry history of governmental efforts to exclude from public employment large numbers of citizens whose only "sin" was "to hold a point of view different from the majority," *Wooley v. Maynard*, *supra*, 430 U.S. at 715, is too recently emblazoned in our memory to allow broad range for the government to disqualify individuals from public employment based on the individual's views. It is too easy, and too common, for men to "fear[] witches and burn[] women," to use Justice Brandeis' memorable words. *Whitney v. California*, 274 U.S. 357, 376 (1927) (concurring opinion). Thus, we believe the court of appeals articulated the appropriate test: "[a]b-

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any public employee based on any statement or opinion so long as the employer testifies that he no longer trusts the employee to do the job; indeed, a simple statement of opposition to the policies of the President could, conceivably, lead a particular Constable to lose confidence in the speaker's judgment.

sent evidence that a government employee's views are inconsistent with the mission of the employing agency *and* with the employee's role in that agency, tolerance is required." JA 136 (emphasis in original). As the appellate court explained:

> A large body of First Amendment jurisprudence is built on the proposition that political liberty will best be secured in the long haul if the government tolerates as much diversity of opinion as its responsibilities will allow. Our First Amendment jurisprudence is a boast that in a free society, foolish ideas will fall of their own weight. The ideal of tolerance is sometimes sorely taxed in practice—when that happens there is all the more reason to recall its long-term benefits. [*Id.*]

Measured by this test, it is clear that the court of appeals correctly concluded that plaintiff was discharged unconstitutionally. As that court recognized, the "primary mission" of the Constable's office, in which plaintiff was employed, "is the service of process and execution of warrants issued by courts whose criminal jurisdiction is limited to Class C misdemeanors, which carry a maximum fine of two hundred dollars"; the office "has no direct law enforcement role." *Id.* at 130-31.[16] Moreover, plaintiff held an "entirely clerical," *id.* at 131, and "utterly ministerial," *id.* at 136, job in that office; "seated at a desk with no phone, in a room of computer terminals closed to the public, her duty was to enter data from court papers into a computer's memory by typing at a conventional CRT," *id.* at 131.[17] It simply defies reason to believe that plaintiff could not be trusted to operate the CRT because she so opposed President Reagan's policies

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[16] "Approximately eighty percent of the office's work involves the service of civil process, mental health warrants, and bringing juveniles to the courts." JA 131.

[17] *See also* JA 36 (district court opinion of April 15, 1983) ("Plaintiff was required to operate a computer terminal entering and monitoring the progress of summonses issued within Defendant Rankin's precinct").

as to hope that if another assassination attempt were made it would succeed. As the court of appeals put it, "[h]owever ill-considered Ardith McPherson's opinion was, it did not make her unfit for her lowly job in Constable Rankin's office." *Id.* at 136.

(2) The Solicitor General suggests an alternative basis for concluding that the *Pickering* balance favors the state in this case, a basis that focuses not on plaintiff's reliability as a CRT operator but rather on the "public 'appearance' and 'reputation' " of the Constable's office. Br. for the United States at 21. Proceeding from the undeniable premise that "[a] law enforcement agency naturally has a strong and legitimate interest in maintaining the reputation and appearance of being fully committed to enforcement of the law," *id.* at 22-23, the Solicitor General contends that this interest justifies plaintiff's discharge as her "comment was completely inconsistent with the public appearance and reputation that the Constable rightfully sought to project," *id.* at 24.

(a) The governmental interest hypothesized by the Solicitor General is simply not implicated on the facts of this case. The Constable did not purport to fire plaintiff because her remark threatened public confidence in the agency. Rather, the Constable repeatedly testified that he fired plaintiff because, in the privacy of his office, plaintiff told him (in response to his question) that she, in fact, hoped an assassination attempt would succeed if it were made. *See* p. 20 and n.4, *supra*.[18] And the sole reason the Constable gave for the discharge is that he lost confidence in plaintiff; the Constable at no point expressed a fear that the plaintiff's views would become a matter of public knowledge and would embarrass his office. Thus, the Solicitor General is conjuring up con-

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[18] The Solicitor General's suggestion that by repeating her statement to the Constable plaintiff "verg[ed] on insubordination" is incomprehensible. *See* Br. for the United States at 24. Plaintiff truthfully answered questions posed by the Constable; if anything, it would have been insubordinate for plaintiff to have refused to answer, or to have answered falsely.

cerns that did not in fact motivate the discharge, and which therefore are not entitled to consideration in determining "whether [the Constable] was justified in discharging [plaintiff]." *Connick*, 461 U.S. at 149. *See also id.* at 154 (justification for discharge turns on what the employer "reasonably believed would [harm the agency's legitimate interests])"; *id.* at 146 (where a matter of public concern is involved, the court must "scrutinize the reasons for [the] discharge").

Furthermore, even if this *post hoc* justification for the discharge were to be entertained, the fact that it was not relied upon by the Constable in making his decision is perhaps the strongest proof that it is not a serious factor in the circumstances of this case. The record confirms this; there is no factual support for the Solicitor General's contention that plaintiff's remark threatened to injure confidence in the Constable's office.

In this regard, it is important to bear in mind that plaintiff did not engage in any act of public advocacy; the remark that led to her discharge was made in a private conversation with her boyfriend and was overheard by just one other employee. Thus, there was no reasonable likelihood that the remark would come to the attention of the public.[19] And, even if plaintiff's remark

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[19] The Solicitor General claims that there was a "substantial" risk that plaintiff's statement would be publicized because it was "the subject of discussion within the office" and because "the Constable quite responsibly decided to report the incident to the Secret Service." Br. for the United States at 26. But the fact that a few persons within the Constable's office discussed the remark hardly suggests that those individuals would disseminate the statement outside of the office (especially if, as the Solicitor General claims, such dissemination would threaten the reputation of the office). And although it is true that the Constable chose to notify the Secret Service of plaintiff's *non*-threatening statement, there is no evidence, or reason to believe, that the Secret Service would publicize the information it received from the Constable.

Finally, there is at least a tension between the Solicitor General's insistence that plaintiff's remark was "private" and not part of any

somehow were to be publicized, it could not reasonably be expected to adversely affect public confidence in the Constable's office. Despite all of the Solicitor General's talk about "law enforcement agenc[ies]," the fact of the matter is that, as the court of appeals stated, the Constable's office "has no direct law enforcement role" and its "primary mission is the service of process and execution of warrants," p. 22, *supra*. Furthermore, nothing in plaintiff's remark could reasonably be interpreted to suggest that she wished to interfere in any way with the ability of the Constable's office to carry out its public mission. And finally, it is difficult to see how the public could be misled into believing that plaintiff, as a CRT operator, was in a position to harm the mission of the agency even if she had a desire to do so. In sum, it is simply inconceivable that the public's confidence in the Constable's ability to serve process would be adversely affected if the public were somehow to learn of plaintiff's statement.

The Solicitor General's argument is based on sheer speculation, devoid of any concrete support (*see, e.g.*, note 19 *supra*). Where First Amendment rights hang in the balance, such speculation cannot sustain the government's position. *See, e.g., Wood v. Georgia*, 370 U.S. 375 (1962).

(b) For the reasons just discussed, this is not a case in which the interest of a government agency in preserving public confidence is implicated in any way. The Court is therefore not called upon to consider what weight, if any, such an interest should be given in the *Pickering* balance in cases where the interest is in fact threatened. It is sufficient to note that the analysis of such a case would be far more complex than the Solicitor General suggests.

"public . . . debate" (Br. at 18), and his contention that there was a "substantial" risk that the remark would constitute a focus of public attention (*id.* at 26).

What the Solicitor General is arguing, at bottom, is that even though the beliefs that a public employee holds and expresses are not in *fact* inconsistent with "the discharge of his public duties," *Branti v. Finkel*, *supra*, 445 U.S. at 517, the First Amendment nonetheless allows the public employer to discharge that employee if the employer reasonably fears that the public will *believe* (however erroneously) that the employee will not faithfully perform his duties or if the public will doubt the agency's commitment or capacity to carry out its function.[20] Such a doctrine threatens basis First Amendment values.

To begin with, the mere fact that the public objects to the views that a public employee holds or expresses cannot in itself justify suppression of speech; for it is the very purpose of the First Amendment to "protect[] the right of individuals to hold a point of view different from the majority," *Wooley v. Maynard*, *supra*, 430 U.S. at 715, and to do so "as to things that touch the heart of the existing order," *Board of Education v. Barnette*, *supra*, 319 U.S. at 642. At the least, then, if an asserted public reaction to the views of a public employee is to be considered in determining whether the employee's discharge is justified, it must be shown that the public reaction is based on a concern as to whether the employee will properly perform his duties, rather than on the public's mere distaste for the employee's views. *Cf. Spence v. Washington*, 418 U.S. 405, 412 (1974); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Even if one could somehow be satisfied that the public's adverse reaction to an employee's expressed views was predicated on legitimate concerns rather than on ideological considerations, it would remain problematic

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[20] If the employee's views are *in fact* inconsistent with the proper performance of his duties, a discharge will be justified on that basis, and there will be no reason to look to public perceptions. Thus the Solicitor General's argument as to the relevance of public perceptions will only come into play in cases where the employee's views are not in fact inconsistent with the proper performance of his duties.

whether the public's *erroneous* conclusion as to the employee's fitness for duty (*see* n.20 *supra*) should be deemed to "justif[y] [the employer] in discharging [the employee]." *Connick*, 461 U.S. at 149. The public employer, after all, can vindicate its reputation by demonstrating to the public the employee's continued fitness for duty rather than succumbing to the public perception and firing the employee; that solution would accord with the general First Amendment principle that the solution to misperceptions is "more speech, not enforced silence." *Whitney v. California*, *supra*, 274 U.S. at 377 (Brandeis, J., concurring), At the very least, before allowing public misperceptions to be accepted as a justification for firing an employee for his speech, it would be necessary to consider such factors as the extent of harm actually caused to the agency by the public's misconception, the extent to which the employer may have contributed to that misconception, and the efforts the employer has made or can make to dispel the misconception.

These and related issues would all have to be considered if this were a case in which there was a real risk that the public would lose confidence in the Constable's office because of plaintiff's remark. But as we have shown, this is not such a case, and thus the issues tendered by the Solicitor General regarding the role that the "public 'appearance' and 'reputation'" of an agency should play in such a case are matters to be left for another day.

(3) One final word is in order. Running through the Solicitor General's discussion of the need to protect a public employer's "reputation" and "appearance" are broad and amorphous statements of "the government's interest in prescribing minimum standards of acceptable speech and conduct for its employees," "the agency's need to foster proper attitudes among its workers," and the importance of requiring all employees to "abide by the agency's minimum standards of decorum and professionalism." Br. for the United States at 27-28. The

Solicitor General further insists that these "minimum standards" should not "var[y] with the 'employee's role in the [agency],'" *id.* at 27. It is difficult to determine what limitations the Solicitor General would recognize on the government's asserted power to require "acceptable speech," "proper attitudes," and "decorum" on the part of all employees. But, to the extent that the Solicitor General suggests that such "minimum standards" can be applied to proscribe speech or beliefs which do not threaten tangible harm to the agency, that suggestion is foreclosed by this Court's precedents.

For example, this Court's decisions with respect to public employee loyalty oaths do not support the proposition that public employees can be required to declare in general terms their "loyalty to the Government" or even their "belief in the form of the Government of the United States," *Law School Research Council v. Wadmond*, 401 U.S. 154, 162 (1971); rather, as early as *Speiser v. Randall*, 357 U.S. 513, 527 (1958), it was recognized that oath statutes are constitutional only to the extent that they are designed "to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public." And the Court's most recent word on that precise subject teaches that under the First Amendment the legitimate function of a properly tailored loyalty oath is not to ensure that employee beliefs and attitudes meet some "minimal standard" devised by the agency, but rather to deny employment to persons who will not agree "to perform [their] public duties lawfully," *Cole v. Richardson*, 405 U.S. 676, 682 (1972), or who will not agree "not to use illegal and constitutionally unprotected force to change the constitutional system . . .," *id.* at 684. *See also* cases cited in *Communist Party of Indiana v. Whitcomb, supra.*

All of these cases make it clear that an employee may not be discharged for running afoul of an agency's conception of "acceptable speech" or "proper attitudes" (Br. for the United States at 27-28), unless the employee's

views will lead to concrete harm that the government may constitutionally prohibit.[21] Because no such showing was made here, the court of appeals correctly held plaintiff's discharge to be unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
JEREMIAH A. COLLINS
CYNTHIA L. ESTLUND
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202-833-9340)
Attorneys for Amicus Curiae
National Education Association

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[21] In determining whether such a threat of harm exists, it is no new learning to recognize that the nature of the employee's duties is highly significant. *See, e.g., Branti v. Finkel, supra; United States v. Robel*, 389 U.S. 258, 266 and n.17 (1967).